DOCKET

EDITOR'S NOTE

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No. 86-5324-CSY
Status: GRANTED

Title: Joseph G. Griffin, Petitioner
v.
Wisconsin

Docketed:
August 19, 1986

Court: Supreme Court of Wisconsin

Counsel for petitioner: Habermehl, Alan G.

Counsel for respondent: Levenson, Barry M.

Entry	Date	Note	Proceedings and Orders
1	Aug 19 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 25 1986		DISTRIBUTED. October 10, 1986
4	Oct 7 1986	F	Response requested.
5	Oct 31 1986		Brief of respondent Wisconsin in opposition filed.
7	Nov 6 1986		REDISTRIBUTED. November 26, 1986
9	Dec 1 1986		REDISTRIBUTED. December 5, 1986
13	Dec 8 1986		Petition GRANTED.
			**********
15	Jan 5 1987		Order extending time to file brief of petitioner on the merits until February 7, 1987.
16	Jan 5 1987	G	Motion of petitioner for appointment of counsel filed.
17	Jan 12 1987		DISTRIBUTED. Jan. 16, 1987. (Motion of petitioner for appointment of counsel).
18	Jan 20 1987		Motion for appointment of counsel GRANTED and it is ordered that Alan G. Habermehl, Esquire, of Madison, Wisconsin, is appointed to serve as counsel for the petitioner in this case.
19	Feb 3 1987		Brief of petitioner Joseph G. Griffin (TEP) filed.
20	Feb 6 1987		Brief amicus curiae of ACLU, et al. filed.
21	Feb 10 1987		Joint appendix filed.
23	Mar 5 1987		Order extending time to file brief of respondent on the merits until March 12, 1987.
24	Mar 5 1987		Brief amicus curiae of United States filed.
25	Mar 9 1987		Brief amicus curiae of California filed.
26	Mar 10 1987		Brief of respondent Wisconsin filed.
27	Mar 12 1987		Brief amicus curiae of New York, et al. filed.
28	Mar 11 1987		SET FOR ARGUMENT. Monday, April 20, 1987. (3rd case).
29	Mar 20 1987		CIRCULATED.
30	Apr 9 1987	X	Reply brief of petitioner Joseph G. Griffin filed.
32	Apr 20 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

86-5324

JOSEPH G. GRIFFIN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

JOSEPH G. GRIFFIN, petitioner herein, by his attorney, ALAN G. HABERMEHL, respectfully moves this Court for the entry of an Order granting petitioner leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis, on the grounds that petitioner is unable to pay any fees and costs in this action, and is unable to give security therefore, for the reason that petitioner has no steady gainful employment, and has no other income or assets with which to pay said fees and costs, or to give security therefore. Petitioner has been found to be indigent by the Wisconsin Office of the State Public Defender, has been granted leave to proceed in forma pauperis and has had counsel appointed for petitioner during proceedings in the trial court, on appeal to the Wisconsin Court of Appeals, on appeal to the Wisconsin Supreme Court, and again on the filing of the attached Petition for Writ of Certiorari.

Counsel for petitioner JOSEPH G. GRIFFIN has been unable to secure an Affidavit executed by petitioner JOSEPH G. GRIFFIN personally, for the reasons set forth in the attached Affidavit of Counsel. Counsel for petitioner believes that the attached Affidavit of Counsel adequately demonstrates the indigency of petitioner JOSEPH G. GRIFFIN, and request that this Court accept said Affidavit of Counsel in lieu of an Affidavit executed by petitioner JOSEPH G. GRIFFIN personally, and on the basis of the attached Affidavit of Counsel grant this Motion for Leave to Proceed In Forma Pauperis. In the alternative,

counsel for petitioner JOSEPH G. GRIFFIN requests that this Court grant a reasonable enlargement of time within which to file an Affidavit executed by Petitioner JOSEPH G. GRIFFIN personally, for the reasons set forth in the attached Affidavit of Counsel.

Dated this 15 day of August, 1986.

Respectfully submitted,

JOSEPH G. GRIFFIN, Petitioner

ALAN G. HABERMEHL
Attorney for Petitioner
KALAL & HABERMEHL
217 South Hamilton Street
Suite 209
Madison, WI 53703
(608) 255-9295

BY: Alan G. Habermehl
ALAN G. HABERMEHL

IN THE SUPREME COURT
OF THE UNITED STATES

JOSEPH G. GRIFFIN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

AFFIDAVIT OF PETITIONER IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF WISCONSIN)
)ss
COUNTY OF DANE)

JOSEPH G. GRIFFIN, being first duly sworn, on oath states that:

1. Your affiant is the petitioner in the above-captioned proceeding. Your affiant makes this affidavit in support of your affiant's Motion For Leave To Proceed In Forma Pauperis in this proceeding.

2. Your affiant is not presently employed.

3. Your affiant's last regular employment was during the period of December, 1983 through March, 1984, at which time your affiant was employed at TCD Systems in Madison, Wisconsin. Your affiant earned $4.00 per hour, with a normal 40 hour work week, for an average gross weekly salary of $160.00. Your affiant has had no regular employment since that employment, and is existing on general relief, from which your affiant receives the amount of $210.00 per month.

4. Your affiant does not own any cash or checking or savings account.

5. Your affiant does not own any real estate, stocks, bonds, notes, or other valuable property, except that your affiant does own an automobile, namely, a 1977 Buick Century, with an approximate market value of $150.00.

6. No persons are dependent upon your affiant for support.

7. I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Dated at this 8. day of _____, 1986.

_____
JOSEPH G. GRIFFIN
Affiant

Subscribed and sworn to before me
this 5th day of February, 1986.

_____
NOTARY PUBLIC, Dane County, Wisconsin
My Commission: _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSEPH G. GRIFFIN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

I QUESTIONS PRESENTED FOR REVIEW

A. May a state probation officer search the residence of a state probationer for evidence of the commission of a crime without first obtaining a search warrant, in the absence of any of the factors normally recognized by this Court as constituting "exigent circumstances?"

B. Regardless of whether a warrant is required for such a search, must the search in any event be based upon probable cause to believe that the evidence was present in probationer's residence, or may the search be based upon a lesser standard of "reasonable grounds to believe" that the evidence was present in probationer's residence?

C. Did the information available to the probation officers in this case prior to their search of petitioner's residence rise to the level of "probable cause," or even the lesser standard of "reasonable grounds to believe?"

II LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to this case.

III TABLE OF CONTENTS AND TABLE OF AUTHORITIES

A. TABLE OF CONTENTS

B. TABLE OF AUTHORITIES

C. TABLE OF STATUTES

IV REPORTS OF OPINIONS

The opinion of the Wisconsin Supreme Court is reported as State v. Griffin, ___ Wis.2d ___, 388 N.W.2d 535 (1986). The opinion of the Wisconsin Court of Appeals is reported as State v. Griffin, 126 Wis.2d 183, 376 N.W.2d 62 (1985). The opinion of the trial court is not reported in any official or unofficial report.

V JURISDICTIONAL STATEMENT

A. The opinion of the Wisconsin Supreme Court sought to be reviewed herein is undated, and was entered on June 20, 1986.

B. No order has been entered either respecting a rehearing, nor granting an extension of time within which to petition for certiorari.

C. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1257(3).

VI CONSTITIONAL PROVISIONS

A. AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE IV,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE XIV, Section 1,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

VII STATEMENT OF THE CASE

On September 4, 1980, petitioner was convicted in a Wisconsin Circuit Court of the misdemeanors of resisting arrest, disorderly conduct and obstructing an officer. Petitioner was placed on probation for those offenses, and, as of April 5, 1983, defendant was still on probation for those offenses.

On April 5, 1983, petitioner's residence was searched by Mr. Michael Lew, a supervisor for the Wisconsin Bureau of Community Corrections and Ms. Joanne Johnson, a probation agent for the Wisconsin Bureau of Community Corrections. Mr. Lew and Ms. Johnson were accompanied by Officers Lathrop, Leppla and Hanson of the City of Beloit Police Department, who also entered petitioner's residence.

Mr. Lew was the person who made the arrangements to have Ms. Johnson and the police officers accompany him to petitioner's residence. Mr. Lew organized the search of petitioner's residence because Mr. Lew had been informed, through a phone call on the morning of April 5, 1983 from the City of Beloit Police Detective Bureau, that petitioner "may have had guns" in petitioner's residence. Mr. Lew could not recall the name of the City of Beloit police officer who provided that information, but he believed that it might possibly have been Truett Pittner. However, Truett Pittner testified that, although he was a detective captain with the City of Beloit Police Department on April 5, 1983, he did not recall contacting Mr. Lew regarding the search of petitioner's residence.

Mr. Lew waited two or three hours after receiving the initial phone call from the City of Beloit Police Detective Bureau before making arrangements with the City of Beloit

Police to provide officers to accompany Mr. Lew and Ms. Johnson to petitioner's residence. Mr. Lew specifically informed the City of Beloit Police that the purpose for which Mr. Lew desired their protection was to search petitioner's residence.

When Mr. Lew, Ms. Johnson and the three police officers arrived at petitioner's residence, all five of them were in plain clothes. Mr. Lew went to the door of petitioner's residence, and petitioner answered the door. Upon petitioner's answering the door, Mr. Lew told petitioner that "we are going to search his residence." Mr. Lew identified himself and Ms. Johnson as being probation officers, and told petitioner that Ms. Johnson was there to assist Mr. Lew with the search of petitioner's residence; Mr. Lew also informed petitioner that the other three persons were police officers.

After this interchange, all five persons entered petitioner's residence. Mr. Lew entered the foyer, and then went to the kitchen. Ms. Johnson went into a bedroom, and the officers went into the living room, with petitioner and Ms. Tanya Turner, a woman who lived at petitioner's residence with peitioner and petitioner's child.

When Ms. Johnson was walking through the foyer, she noticed a baggie of what she believed to be marijuana sitting on a table, but did not take possession of it at that time. After making that observation, Ms. Johnson walked into the bedroom. Ms. Johnson then walked into the kitchen, and met Mr. Lew there. The two of them then walked into the living room, with Mr. Lew in the lead. When they arrived in the living room, the suspected marijuana was still on the table, and Ms. Johnson picked it up and put it in a brown paper bag.

As Mr. Lew was entering the living room, one of the officers pointed toward the area in which a table, with a television on top of it, was sitting, with a half empty drawer in the table. In the drawer Mr. Lew found the handgun which formed the basis for the prosecution of petitioner in this action. Mr. Lew turned the gun over to one of the accompanying police officers for "safe keeping." Ms. Johnson took

possession of the alleged marijuana and did not turn it over to the police. Once Mr. Lew found the gun, Mr. Lew directed the accompanying police officers to arrest petitioner, which was done.

On April 11, 1983, a Criminal Complaint was filed in Rock County Circuit Court, Branch IV, charging petitioner with possession of a firearm by a felon, contrary to Wis. Stat. §941.29(2), and possession of THC, contrary to Wis. Stat. §161.14(4)(t) and §161.41(3); both charges were alleged to fall under the provisions of Wis. Stat. §939.62(1)(b) for enhanced penalty for habitual criminality.

Petitioner waived preliminary hearing on April 28, 1983, and was bound over for trial to Rock County Circuit Court, Branch IV.

On May 3, 1983, an Information was filed in Rock County Circuit Court, Branch IV, charging petitioner with the same offenses as were charged in the Criminal Complaint.

An arraignment was held on May 16, 1983, at which time petitioner stood mute, and not guilty pleas were entered on behalf of petitioner to each of the charges in the Information.

Subsequent to the arraignment, petitioner filed a Motion to Sever, a Motion to Dismiss Habitual Criminality Allegation, a Motion to Suppress all evidence obtained during, or as the fruit of, the search of petitioner's residence and a Motion to Dismiss -- Illegal Arrest, seeking the dismissal of the action based upon the ground that petitioner's arrest was based upon evidence obtained as a result of the illegal search of petitioner's residence.

On July 15, 1983, testimony was taken on petitioner's Motion to Suppress and Motion to Dismiss -- Illegal Arrest. On August 15, 1983, the trial court granted the Motion to Sever. Also on that date, the trial court denied petitioner's Motion to Suppress and Motion to Dismiss -- Illegal Arrest. A written order to that effect was signed by the trial court on September 2, 1983. Finally, on that date the trial court granted petitioner's Motion to Dismiss Habitual Criminality

Allegation. The trial court then ordered that the trial on the charge of possession of a firearm by a felon precede the trial on the possession of THC charge. The possession of THC charge was ultimately dismissed by the State.

At the trial of this action on August 18, 1983, Mr. Lew testified that, along with the aforementioned handgun, several bullets were also found during the search of petitioner's residence. At the trial, Ms. Johnson testified that she found the bullets in question. Ms. Johnson testified that, after the gun had been found, petitioner was allowed to make a telephone call to petitioner's mother, and that Ms. Johnson heard the petitioner "tell the person on the other end that he had gotten busted with a gun that John H. gave to him."

The substance of this telephone call was also testified to by City of Beloit Police Officer Sam W. Lathrop.

Petitioner testified regarding both the gun and the telephone call.

Ms. Rose Griffin, the person to whom petitioner spoke in that telephone call, also testified regarding the telephone call.

On rebuttal, the state put Mr. Lew back on the stand, and he testified to statements made by petitioner to Mr. Lew, during the search of petitioner's residence, concerning possession of the gun. City of Beloit Police Officer Victor Hanson also testified that petitioner made a statement, during the course of the search of petitioner's residence, that petitioner was "holding" the gun. In response to this rebuttal testimony, petitioner again took the stand, and denied making the statements in question.

On August 18, 1983, the jury returned a verdict of guilty. On September 16, 1983, a sentencing hearing was held, at the conclusion of which the Court imposed a sentence of two years imprisonment.

A Judgment of Conviction and Sentence to Wisconsin State Prisons adjudging petitioner guilty of possession of a firearm as a convicted felon, in violation of Wis. Stat. §941.29(2),

and imposing a prison term of two years, was entered on September 16, 1983. On October 24, 1983, an Amended Judgment of Conviction and Sentence to Wisconsin State Prisons was entered by the trial court, which was identical to the original judgment, except that it included one hundred and one days credit toward defendant's sentence for pre-trial and pre-sentencing incarceration. From these judgments of conviction and sentences to Wisconsin State Prisons petitioner filed a Notice of Appeal to the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals affirmed petitioner's conviction, ruling that a warrant was not required for the search of petitioner's residence, that a diminished standard of "reasonable grounds to believe" was all that was required to justify the warrantless search of petitioner's residence, and that that standard had been met in this case.

From that decision, defendant filed a Petition for Review, which the Wisconsin Supreme Court granted on December 11, 1985. On June 20, 1986, the Wisconsin Supreme Court entered its decision affirming the decision of the Wisconsin Court of Appeals on the grounds that the nature of probation diminishes a probationer's reasonable expectation of privacy to such an extent that a warrant is not required for a probation agent to search a probationer's residence; that that diminished expectation of privacy further entails that such a search need not be based upon probable cause, but may be based upon mere reasonable grounds to believe that the evidence sought will be found at the probationer's residence; that the information possessed by the probation officers in this case was sufficient to meet that lesser standard; and that the search of petitioner's residence was therefore lawful, and the evidence obtained thereby was properly admitted against petitioner at petitioner's trial.

From that judgment of the Wisconsin Supreme Court, petitioner has filed this Petition for Writ of Certiorari in this Court.

As can been seen from the foregoing, petitioner first raised the federal questions sought to be reviewed by this Court in the trial court by means of filing a Motion to Suppress subsequent to petitioner's arraignment, which is the appropriate procedure under Wisconsin law. The trial court held a hearing on this motion, at the conclusion of which the trial court denied petitioner's motion. Under Wisconsin law, no further procedural steps were required to preserve this issue for appeal to the Wisconsin Court of Appeals. By timely filing the Notice of Appeal to the Wisconsin Court of Appeals, and by raising the federal question in petitioner's Brief in that Court, the federal questions were preserved for review by the Wisconsin Court of Appeals, which it did in its published decision. By specifically including the federal questions in petitioner's timely filed Petition for Review to the Wisconsin Supreme Court, and by the Wisconsin Supreme Court's acceptance of that Petition for Review, the federal questions were properly preserved for review by the Wisconsin Supreme Court, which it did in its published decision.

VIII ARGUMENT FOR ALLOWANCE OF WRIT

A. THE DECISION OF THE WISCONSIN SUPREME COURT IS IN CONFLICT BOTH WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT, AND OF FEDERAL COURTS OF APPEALS, AND THE FEDERAL COURTS OF APPEALS' DECISIONS ON THESE ISSUES ARE IN CONFLICT WITH EACH OTHER.

The Wisconsin Supreme Court ruled that the nature of probation entails an abrogation of the normal warrant requirement, even to the extent of absolving a probation agent from obtaining a warrant before searching the probationer's personal residence. Numerous federal courts of appeals and state courts of last resort have ruled that a warrant is required before a probation officer may search a probationer's own residence. United States v. Reg, 678 F.2d 382 (2nd Cir. 1982); United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983) (en banc); United States v. Hallman, 365 F.2d 289 (3rd Cir. 1966); United States v. Workman, 585 F.2d 1205 (4th Cir. 1978);

United States v. Bradley, 571 F.2d 787 (4th Cir. 1978); State v. Fogarty, 610 P.2d 140 (Mont. 1980); State v. Culbertson, 29 Or.App. 363, 563 P.2d 1224 (1977); Tamez v. State, 534 S.W.2d 686 (Tex. 1976); Croteau v. State, 330 So.2d 577 (Fla. 1976); State v. Cullison, 173 N.W.2d 533 (Iowa 1970). Other federal courts and state courts of last resort have decided this issue to the contrary. United States v. Scott, 678 F.2d 32 (5th Cir. 1982); Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) (en banc) cert. denied, 423 U.S. 897 (1975); People v. Anderson, 189 Colo. 34 (1975); State v. Fields, 686 P.2d 1379 (Hawaii 1984); People v. Huntley, 43 N.Y.2d 175, 371 N.E.2d 794 (1977); State v. Velasquez, 672 P.2d 1254 (Utah 1983).

This sharp division of authority on this issue, which is further exacerbated when those cases which permit warrantless search are analyzed in an attempt to determine the standard of proof required to justify the warrantless search, indicates that these issues continue to trouble both the lower federal courts and the state courts of last resort. This conflict can only be resolved by a definitive opinion from this Court.

B. THE DECISION OF THE WISCONSIN SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SPECIFICALLY DECIDED BY THIS COURT, BUT WHICH SHOULD BE, AND THE DECISION OF THE WISCONSIN SUPREME COURT IS IN CONFLICT WITH WELL SETTLED PRINCIPLES OF FEDERAL CONSTITUTIONAL LAW ESTABLISHED BY THIS COURT.

To petitioner's knowledge this Court has never directly ruled on the issues raised by this Petition for Writ of Certiorari. The Wisconsin Supreme Court clearly stated in its opinion that it was interpreting the United States Constitution as well as the Wisconsin Constitution in rendering its decision. The issue before this Court is the fundamental one of the rights of citizens of this country to privacy and freedom from government intrusion in their own homes. The number of persons on probation and parole, both federal and state, across this country must certainly run into the many thousands, and probably into the hundreds of thousands. It is

the criminal justice system's primary means of supervising the vast majority of convicted criminals who are not deemed to require physical incarceration, and as such is essential to the functioning of the criminal justice system in this country. The resolution of a federal question of this magnitude should not be left to the individual states or federal courts of appeals, but should rather come from this Court.

Furthermore, although this Court has never ruled specifically upon the issues presented in this Petition for Writ of Certiorari, the controlling principles of law which ought to have governed the decision of the Wisconsin Supreme Court, and with which its decision is in conflict, have been repeatedly and vigorously asserted by this Court.

At no point during the proceedings in any of the state courts involved in this case did the state rely upon any of the normally recognized "exigent circumstance" exceptions to the normal warrant rule. In all of this Court's previous decisions dealing with searches of a person's residence, this Court has drawn a bright line at the threshold of the home, over which government officials simply may not cross without a warrant, in the absence of one of the few recognized exceptions to that warrant requirement:

> The fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 5 L.Ed.2d 734, 81 Supreme Court 679, 97 ALR2d 1277. In terms that apply equally to seizures of property and to seizures of person, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 589, 590; 63 L.Ed.2d 634; 100 S.Ct. 1371 (1980). [Emphasis Added.]

This position was recently reaffirmed by this Court in no uncertain terms in another case arising out of Wisconsin, Welsh v. Wisconsin, 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091

(1984), in which this Court determined that even the obvious societal interest in obtaining evidence of intoxication with which to prosecute intoxicated drivers was not sufficient to overcome the normal warrant requirement.

In its decision, the Wisconsin Supreme Court has created out of whole cloth, with no supporting authority from this Court, a "probationer" exception to the normal requirement that a warrant be obtained before a person's residence may be searched. The protection against unreasonable searches and seizures embodied in the rule that warrantless searches are per se unreasonable is at its strongest when the issue is the search of a person's own residence, since the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, supra, 445 U.S. at 585. The Wisconsin Supreme Court should not be allowed to destroy that fundamental barrier against governmental intrusion into our lives which this Court has so carefully created and vigilantly defended.

A similar analysis applies to the question of whether, regardless of whether a warrant is required, a search must still be based upon probable cause, or may be based upon some lesser standard of "reasonable grounds to believe." It has always been a touchstone of this Court's Fourth Amendment jurisprudence that full scale searches or seizures, whether conducted in accordance with the warrant requirement or pursuant to one of its exceptions, are reasonable in Fourth Amendment terms only if based upon a showing of probable cause. It is only those searches or seizures which are substantially less intrusive than full scale searches or seizures which this Court has allowed to be based upon the lesser standard of reasonable suspicion or belief. See: Hayes v. Florida, 470 U.S. ___, 84 L.Ed.2d 705, 106 S.Ct. ___ (1985); Berkmer v. McCarty, 468 U.S. ___, 82 L.Ed.2d 317, 104 S.Ct. ___ (1984); Florida v. Royer, 460 U.S. 491 (1983); Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). In

all of these cases, this Court has been at great pains to restate the principle that full-blown searches or seizures may be based only upon probable cause, and that it is only brief, momentary, relatively nonintrusive detentions or searches which may be based upon a standard less than probable cause. The Wisconsin Supreme Court has turned this standard upon its head, and applied the evidentiary standard whch this Court says justifies only the most minimal of intrusions upon a person's Fourth Amendment rights to justify the most serious possible intrusion upon a person's Fourth Amendment rights, the invasion of the sanctity of his own home. This is an egregious misreading of the applicable principles of constitutional law as consistently laid down by this Court, and, given the seriousness of the effect of this decision, it should be reviewed and overturned by this Court.

Finally, it is readily apparent that the Wisconsin Supreme Court's decision that the facts present in this case satisfy even the minimal standard of reasonable grounds to believe (much less probable cause) that the evidence to be sought was in fact present at petitioner's home, is so clearly erroneous that it essentially takes away even the minimal protection ostensibly granted to probationers by the decision of the Wisconsin Supreme Court. The information available to the probation officers prior to their search of petitioner's residence consisted of the vaguest of tips, from an ultimate source whose identity was completely unknown to anyone, supposedly relayed through a police officer, and possibly other persons, who are likewise unidentifiable, containing no internal verification in the form of credible detail, and which was in no way corroborated by any circumstances known to the probation officers prior to their search. If this information constitutes even "reasonable grounds to believe," much less "probable cause," than that standard is in fact no standard at all, and the decision of the Wisconsin Supreme Court really means that the United States Constitution imposes no restraint whatsoever upon the ability of probation officers to search

the homes of their probationers at will. If for no other reason, this Court should accept review of this decision of the Wisconsin Supreme Court, and reverse it.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and should require full briefs and arguments on the merits.

Dated this 15 day of August, 1986.

Respectfully submitted,

JOSEPH G. GRIFFIN, Petitioner

ALAN G. HABERMEHL
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217 South Hamilton Street
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(608) 255-9295

BY: _____
ALAN G. HABERMEHL

IX APPENDIX

STATE of Wisconsin,
Plaintiff-Respondent,

v.

Joseph G. GRIFFIN,
Defendant-Appellant-Petitioner.

No. 84-621-CR.

Supreme Court of Wisconsin.

Argued June 4, 1986.

Opinion Filed June 20, 1986.

Defendant was convicted in the Circuit Court, Rock County, J. Richard Long, J., of possession of firearm by felon, and he appealed. The Court of Appeals, 126 Wis.2d 183, 376 N.W.2d 62, affirmed, and defendant appealed. The Supreme Court, Day, J., held that: (1) warrantless search of probationer's residence by probation officer based on reasonable grounds to believe that probationer had contraband at his residence was constitutional, and (2) search of defendant's apartment was based on reasonable grounds.

Affirmed.

Shirley S. Abrahamson, J., filed dissenting opinion.

Bablitch, J., filed dissenting opinion.

1. Criminal Law ⇐982.8

Probation agent who reasonably believes that a probationer is violating the terms of probation may conduct a warrantless search of probationer's residence, and evidence obtained in search may be used at a trial seeking new conviction of the probationer if the search is otherwise reasonable. U.S.C.A. Const.Amends. 4, 14.

2. Criminal Law ⇐982.8

Warrantless search of probationer's residence could be made by probation officer based on "reasonable grounds" to believe that probationer had contraband at his residence, where probation officer was informed by police detective that there might be guns in probationer's apartment. U.S.C.A. Const.Amends. 4, 14.

3. Criminal Law ⇐982.8

Reasonable grounds standard contained in administrative code, which was less than probable cause standard needed to obtain warrant, was sufficient for searches and seizures conducted by probation officers of a probationer's residence. U.S.C.A. Const.Amends. 4, 14; W.S.A. 941.29(2).

4. Criminal Law ⇐982.8

Probation officer had reasonable grounds to make warrantless search of probationer's residence on tip from police detective that there might be guns in probationer's apartment, where search was not a police search, purpose of police officers in going to probationer's residence was for protection of probation officers, and gun was discovered in drawer which was apparently broken in such a way as to allow gun to be seen in unopened drawer. U.S.C.A. Const.Amends. 4, 14; W.S.A. 941.29(2).

Alan G. Habermehl, Madison, argued, for defendant-appellant-petitioner; Kalal & Habermehl, Madison, on brief.

Barry M. Levenson, Asst. Atty. Gen., argued, for plaintiff-respondent; Bronson C. La Follette, Atty. Gen., on brief.

DAY, Justice.

This is a review of a published decision of the court of appeals, *State v. Griffin*, 126 Wis.2d 183, 376 N.W.2d 62 (Ct.App. 1985), affirming the judgment of the circuit court for Rock county, Honorable J. Richard Long, circuit judge, convicting Joseph G. Griffin, (Defendant) of possession of a firearm by a convicted felon contrary to Section 941.29(2), Stats.[1] Defendant was previously convicted of possession of heroin with intent to deliver which is a felony. A probation agent discovered a gun at the Defendant's residence during a warrantless search. At the time of the search, Defendant was on probation for resisting arrest, disorderly conduct and obstructing an officer. The trial court denied Defendant's motion to suppress the weapon as evidence, and the court of appeals affirmed. The issues on review are: 1) Does the nature of probation justify an exception to the warrant requirement for searches of a probationer's home by a probation officer?; if so, 2) May a probation officer conduct a warrantless search of a probationer's home based on "reasonable grounds," rather than probable cause, to believe the probationer may possess contraband?; if so, 3) Do the facts of this case constitute reasonable grounds to believe that the Defendant possessed contraband?

We hold that by its nature, probation places limitations on the liberty and privacy rights of probationers, and these limitations justify an exception to the warrant requirement. Furthermore, we hold that a probation officer may conduct a warrantless search of a probationer's residence if he has "reasonable grounds" to believe that a probationer has contraband. Because we hold that the search by the probation officers was based on reasonable grounds, we affirm the court of appeals.

On September 4, 1980, Defendant was convicted of resisting arrest, disorderly conduct and obstructing an officer. Defendant was placed on probation for these offenses and was still on probation as of April 5, 1983.

Mr. Michael T. Lew, a supervisor for the State Bureau of Probation and Parole in Beloit, testified at the suppression hearing that on April 5, 1983, he received a phone call from the Beloit Detective Bureau that the Defendant "may have had guns in his apartment." While Mr. Lew believed the source of the information was Truett Pittner, a detective captain, Captain Pittner testified at the suppression hearing that he did not believe he called Mr. Lew, but rather, believed it was one of his detectives. After waiting two or three hours for the Defendant's probation officer, Mr. Lew made arrangements for another probation agent, Ms. Joanne D. Johnson, to participate in the search, and for three Beloit police officers, Officer Sam W. Lathrop, Officer Gerald A. Lappia and Detective Victor Hanson, to provide protection for him and Ms. Johnson.

Mr. Lew, Ms. Johnson and the three plainclothes police officers went to the Defendant's apartment. When Defendant answered the door, Mr. Lew told Defendant who they were and informed him that they were going to search his residence. Upon entering the apartment, Mr. Lew went into the kitchen to search, Ms. Johnson went into a bedroom to search, and the police officers, who did not search, went into the living room with the Defendant and a woman who lived with Defendant. Upon entering the apartment, Ms. Johnson saw what she perceived to be marijuana on a living room table, but did not take possession of it at that time.

When Mr. Lew entered the living room, followed by Ms. Johnson, one of the officers pointed toward the area where a table, with a broken drawer which made it possible to see inside the drawer, was located. The table was located in the general direction that Mr. Lew was headed. In the drawer, Mr. Lew found a handgun and turned it over to one of the police officers. He then directed the officers to take Defendant "into custody on a probation violation apprehension." Defendant alleged that one of the officers told Mr. Lew that there was a gun in the drawer. Ms. Johnson, upon entering the living room, took possession of the alleged marijuana.

On April 11, 1983, a criminal complaint was filed charging the Defendant with possession of a firearm by a felon, contrary to Section 941.29(2), Stats., and possession of a controlled substance, THC, contrary to

1. Section 941.29(1) and (2), Stats., provides in part:

"941.29 Possession of a firearm. (1) A person is subject to the requirements and penalties of this section if he or she has been:
"(a) Convicted of a felony in this state....
"(2) Any person specified in sub. (1) who, subsequent to the conviction for the felony or other crime, as specified in sub. (1), ... possesses a firearm is guilty of a Class E felony."

Sections 161.14(4) and 161.41(3). Both charges were alleged to fall under Section 939.62, allowing for an enhanced penalty for habitual criminality.

Defendant filed the following motions: motion to sever, motion to dismiss habitual criminality allegations, motions to dismiss both charges, motion to suppress all evidence obtained during the search of his residence and a motion to dismiss for illegal arrest, seeking dismissal on the ground that the arrest was based on evidence obtained in an illegal search. The motions to sever and dismiss the habitual criminality allegations were granted, and all the other motions were denied. The trial court ordered that the trial on the possession of a firearm by a felon precede the trial for the possession of THC.

In denying the Defendant's motions to dismiss because of an illegal arrest and to suppress evidence, the trial court held that Defendant's fourth amendment rights were not violated when the probation officers searched his residence without a warrant. It ruled that a probation officer must act reasonably in making a search of a probationer's residence. Based on the evidence before it, the trial court determined that the search was reasonable. Furthermore, the trial court found as a matter of fact, that the search was not a police search and that the police officers were present to protect the probation officers.

In addition to the handgun, other evidence, obtained from the search, was admitted into evidence at the jury trial on August 18, 1983.

The jury found the Defendant guilty of possession of a firearm by a convicted felon. The charge of possession of THC was dismissed and "read in" at the sentencing. The judgment of conviction and sentence to Wisconsin State Prisons, dated September 16, 1983, sentenced Defendant to a prison term of two years. An amended judgment, dated October 24, 1983, gave Defendant one hundred and one days credit toward the two year sentence. Defendant appealed the judgment and amended judgment to the court of appeals.

In affirming, the court of appeals relied on the logic of *State v. Tarrell*, 74 Wis.2d 647, 247 N.W.2d 696 (1976), to conclude that a probation officer may conduct a warrantless search of a probationer's dwelling even if the search does not meet one of the usual exceptions to the warrant requirement if the search is reasonable. The court of appeals upheld the "reasonable grounds to believe" standard in the Wisconsin Administrative Code Section HSS 328.21(4) (currently section HSS 328.21(3)(a)) as an adequate protection of a probationer's constitutional rights, and concluded that the tip from the police constituted reasonable grounds to believe that the probationer's living quarters contained contraband. Defendant petitioned this court for review and review was granted.

The constitutional legality of a warrantless search of a probationer's residence by a probation officer raises a question of law. This court reviews questions of law "independently without deference to the decisions of the trial court and court of appeals." *Ball v. District No. 4 Area Board*, 117 Wis.2d 529, 537, 345 N.W.2d 389 (1984).

Defendant's motion to suppress the handgun was based on the fourth and fourteenth amendments to the United States Constitution[2] and art. 1, sections 1 and 11

2. The fourth amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourteenth amendment to the United States Constitution provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

of the Wisconsin Constitution.[3] The provisions of the fourth amendment and art. 1, section 11 which prohibit unreasonable searches and seizures are almost identical. In *State v. Boggess*, 115 Wis.2d 443, 448-449, 340 N.W.2d 516 (1983), this court stated that the basic purpose of these provisions is:

"[T]o safeguard the privacy and security of individuals against arbitrary invasions by government officials. *See Michigan v. Tyler*, 436 U.S. 499, 504 [98 S.Ct. 1942, 1947, 56 L.Ed.2d 486] (1978). The United States Supreme Court has consistently held that warrantless searches are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions. *Cady v. Dombrowski*, 413 U.S. 433, 439 [93 S.Ct. 2523, 2527, 37 L.Ed.2d 706] (1973). These exceptions have been 'jealously and carefully drawn', *Jones v. United States*, 357 U.S. 493, 499 [78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514] (1958), and the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 [91 S.Ct. 2022, 2032, 29 L.Ed.2d 564] (1971)."

A person's home or residence is entitled to special dignity and sanctity. *Lanach v. State*, 84 Wis.2d 587, 594, 267 N.W.2d 278 (1978). The exceptions to the search warrant requirement recognized by the United States Supreme Court include, consent, search incident to a lawful arrest, hot pursuit, exigent circumstances and plain view. *Texas v. Brown*, 460 U.S. 730, 735-736, 103 S.Ct. 1535, 1539-1540, 75 L.Ed.2d 502 (1983); *Washington v. Chrisman*, 456 U.S. 1, 5-7, 9-10, 102 S.Ct. 812, 815-817, 818, 70 L.Ed.2d 778 (1982) (plain view and consent). The state does not rely on any of these recognized exceptions to justify the warrantless search of a probationer's residence by a probation officer, but rather, it relies on the Defendant's probationary status. If there is to be such an exception, its foundation is to be found in the nature of probation. *See, Tarrell*, 74 Wis.2d at 653, 247 N.W.2d 696. Neither this court nor the United States Supreme Court has declared such an exception.

Defendant argues that the court should require the probation agent to obtain a search warrant, absent exigent circumstances. He argues that the *Tarrell* decision created a very limited exception to the warrant requirement based on the fact that the defendant was only subjected to a limited invasion of privacy for a short period of time. Furthermore, Defendant propounds three public policy reasons why this court should not create a probationer exception to the warrant requirement: 1) Probationers are citizens whose constitutional rights should not be limited absent a compelling reason; 2) Such an exception invites abuse by the police; and, 3) Rights of innocent third parties must be considered. In response, the state argues that probationers have a diminished expectation of privacy which justifies the exception to the warrant requirement. It argues that the reasoning employed in *Tarrell* requires the conclusion that warrantless searches of a probationer's residence, by a probation officer, on less than probable cause, are constitutionally acceptable. Finally, the state argues that the policy arguments of the Defendant are unpersuasive.

deny to any person within its jurisdiction the equal protection of the laws."

3. Article 1, Section 1 of the Wisconsin Constitution provides:

"Equality; inherent rights. SECTION 1. . . . All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

Article 1, Section 11 provides:

"Searches and seizures. SECTION 11. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

"Although ther. . some authority to the effect that the Fourth Amendment rights of probationers and parolees are of precisely the same scope and dimension as those of the public at large, the weight of authority is to the contrary.... And while there is some disagreement as to whether a probationer's Fourth Amendment rights are diminished to the same extent and degree as those of a parolee, there is considerable authority supporting the proposition that probationers may lawfully be subjected to searches which, absent their probation status, would be deemed unlawful because of the absence of probable cause or a search warrant or both." 3 W. LaFave, *Search and Seizure*, Section 10.10, at 421-422 (1978). (Footnotes omitted.)

As the court of appeals pointed out, there is ample authority for the viewpoint that probation or parole officers may conduct warrantless searches of a probationer's or parolee's residence. *See, e.g., United States v. Scott*, 678 F.2d 32, 34-35 (5th Cir.1982); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.1975) (en banc), cert. denied, 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975); *People v. Anderson*, 189 Colo. 34, 536 P.2d 802, 805 (1975); *State v. Fields*, 686 P.2d 1379, 1389-1390 (Hawaii 1984); *State v. Pinson*, 104 Idaho 227, 657 P.2d 1095, 1099-1100 (Ct.App.1983) (evidence obtained from a search of the defendant used in a probation revocation hearing); *People v. Huntley*, 43 N.Y.2d 175, 371 N.E.2d 794, 796, 401 N.Y.S.2d 81 (1977); *State v. Earnest*, 293 N.W.2d 365, 368-369 (Minn.1980) (evidence obtained used in a probation revocation hearing; *State v. Velasquez*, 672 P.2d 1254, 1260 (Utah 1983); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088, 1094 (1974). There is also some authority for the viewpoint that a probation or parole officer may not search a probationer's or parolee's residence without a warrant, unless one of the judicially recognize.. exceptions is present. *United States v. Ess*, 678 F.2d 382, 387-388 (2nd Cir.1982) (concluding that such requirement would not significantly interfere with the dual goals of probation); *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir.1978); *State v. Culliver*, 173 N.W.2d 533, 537 (Iowa 1970), cert. denied, 398 U.S. 960, 90 S.Ct. 1941, 26 L.Ed.2d 270 (1970) (holding that a parolee's fourth amendment rights receive the same recognition as any other person); *State v. Peperty*, 187 Mont. 288, 610 P.2d 140, 132 (1980) (holding warrant needed to protect legal interests of innocent third persons).[4]

This court has recognized limits on the liberty and privacy interests of probationers based on the nature of probation. *Tarrell*, 74 Wis.2d at 654, 247 N.W.2d 696. In *Tarrell*, the defendant was on probation for enticing a child for immoral purposes when his probation agent was informed that he was a suspect in a similar offense. Because of the similarity between the two offenses, Tarrell's probation agent ordered him to appear at the police station and be photographed. Defendant complied, but alleged that the required appearance was an unconstitutional seizure of his body and the photographs were also an unconstitutional seizure in violation of the fourth amendment. *Id.* at 653-655, 247 N.W.2d 696. In holding the warrantless seizures constitutional, this court reasoned:

"If there is to be an exception to the requirements of the fourth amendment granting probation agents a limited right to search or seize a probationer without a warrant, the foundation for this exception lies in the nature of probation itself. Probation, like parole, 'is an integral part of the criminal justice system and has as its object the rehabilitation of those convicted of crime and the protection of the state and community interest.' *State ex rel. Niederer v. Cady*, 72 Wis.2d 811, 822, 240 N.W.2d 626, 633 (1976). While

4. In determining whether the fourth amendment protection against unreasonable searches and seizures has been violated, several courts fail to distinguish between probation status or parole status or treat them as the same. *See, e.g., United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir.1975); *Pinson*, 657 P.2d at 1098, n. 1; *Earnest*, 293 N.W.2d at 368 n. 2; *Snow v. State*, 95 Nev. 89, 590 P.2d 115, 1154 (1979); *Velasquez*, 672 P.2d at 1258, n. 2.

probation is ... rivilege, not a matter of right, once it has been granted this conditional liberty can be forfeited only by breaching the conditions of probation. A sentencing judge may impose conditions which appear to be reasonable and appropriate. Sec. 973.09, Stats. A sentence of probation places the probationer "in the custody of the department" subject to the conditions of probation and rules and regulations of the Department of Health and Social Services. Sec. 973.10. *All conditions, rules and regulations must be imposed with the dual goal of rehabilitation of the probationer and protection of the public interest. The imposition of these conditions, rules and regulations demonstrates that while a probationer has a conditional liberty, this liberty is neither as broad nor as free from limitations as that of persons who have not committed a crime.* The expectations of privacy of a person on probation cannot be the same as the expectations of privacy of persons not on probation. It is only the reasonable expectations of privacy which the fourth amendment protects. *Conditions of probation must at times limit the constitutional freedoms of the probationer. Necessary infringements on these freedoms are permissible so long as they are not overly broad and are reasonably related to the person's rehabilitation. By the very nature of probation, limitations on the liberty and privacy of probationers are imposed. These limitations are the bases for an exception to the warrant requirement of the fourth amendment.*" *Id.* at 653-654, 247 N.W.2d 696. (Footnotes omitted.) (Emphasis added.)

Furthermore, this court stated that the application of a "less stringent standard for the probation agent's search and seizure" coincides with the agent's dual role of assisting in rehabilitating the probationer and protecting the public. *Id.* at 655, 247 N.W.2d 696. "While there may not have been probable cause for the issuance of a warrant, there was probable cause for the agent's attempt to determine whether Tarrell had complie.. .ith the probation conditions." *Id.*

In *Tarrell*, this court determined that the seizures were reasonable, and therefore, constitutional. *Id.* at 656-657, 247 N.W.2d 696. A probation agent has a duty to determine whether the probationer is complying with the terms of his probation, and in *Tarrell*, this court determined that ordering the defendant to have his photograph taken, and the taking of the photograph furthered the agent's efforts to comply with this duty. *Id.* at 655-656, 247 N.W.2d 696.

Tarrell does not hold that a probation agent may conduct a warrantless search of a probationer's residence, in the absence of circumstances that would permit such a search. Nevertheless, the logic employed by the court in *Tarrell*, is equally applicable to this situation. This is similar to the analysis used by other courts to justify such searches.

In *Earnest*, the Minnesota court looked at the relationship between the probation officer and his probationer and the dual nature of probation. The court recognized that because of this special relationship the "law relating to probation searches cannot be strictly governed by automatic references to ordinary search and seizure law." *Earnest*, 293 N.W.2d at 368. The *Earnest* court cited this court's decision in *Tarrell* for this proposition. In *Scott*, the fifth circuit focused on the dual role of parole to justify warrantless searches. *Scott*, 678 F.2d at 34-35. In *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-266 (9th Cir.1975), the ninth circuit recognized that while probationers are subject to constitutional limitations from which other citizens are free, such limitations must serve the ends of probation. In balancing the probationer's right to privacy with the probation system's interest in invading the probationer's privacy, the court concluded that a probation officer need not obtain a warrant prior to a search.

We are not persuaded by the Defendant's argument that this court should not

create a probation... exception to the warrant requirement because it will result in abuse by the police. We are not granting a right to the police to undertake a warrantless search. This exception applies to searches conducted by probation agents. It is the nature of probation and the duties placed on probation agents that justify such searches. An otherwise reasonable search should not be deemed unlawful simply because the police are the source of the information that leads to the search.[5] The trial court found that the search was not a police search, and that the police were present for protection purposes.

Nor are we persuaded by the Defendant's argument that a warrant is necessary to protect the rights of innocent third persons who may be living with the probationer. Defendant cites only *Fogarty* for this proposition. *Fogarty*, 610 P.2d at 102. In dicta, the court in *Velasquez* said that caution would suggest that a warrant be obtained if the rights of nonparolees may be involved. *Velasquez*, 472 P.2d at 1280, n. 3. In accordance with the court of appeals' decision in this case, we find that a nonprobationer's rights may be affected whether or not a warrant is required. If a warrant were required, the impartial magistrate would determine whether there was probable cause to search the probationer's residence, and the rights of other persons would not be considered. We are not creating a right for probation officers to conduct arbitrary and unreasonable searches. Though a probationer has a diminished expectation of privacy, he still has privacy rights that must be respected. We conclude that the standard which a probation agent must comply with to conduct a warrantless search adequately protects the probationer's rights, and there is no need to require a warrant simply to protect the rights of other persons. *See, People v. Moore*, 5 Cal.3d 789, 488 P.2d 630, 634, 97 Cal.Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016, 92 S.Ct. 1288, 31 L.Ed.2d 479 (1972).

[1] Therefore, based on the nature of probation, we conclude that a probation agent who reasonably believes that a probationer is violating the terms of probation may conduct a warrantless search of a probationer's residence.[6] Furthermore, we conclude that the evidence obtained in the search may be used, as in this case and in *Terrell*, at a trial seeking a new conviction against the probationer. If the search is otherwise reasonable, such a search is constitutional. Thus, there is no reason to suppress any evidence discovered during a warrantless search of the probationer's residence.

The ultimate standard set forth in the fourth amendment and art. 1, section 11 is one of reasonableness. People have a right to be free from unreasonable searches and seizures. "[T]his court has maintained that the reasonableness of a search or seizure is to be determined by the facts and circumstances of each case." *Terrell*, 74 Wis.2d at 655, 247 N.W.2d 696. (Citations omitted.) In determining what constitutes a reasonable search, we turn for guidance to those decisions that have allowed warrantless searches of a probationer's or parolee's residence by a probation or parole agent. These cases hold that a search may be constitutionally made based on a standard of reasonableness, which is less than probable cause. These cases have variously described this standard. *See, e.g., Scott*, 272 F.2d at 25 (reasonable suspicion supported by specific and articulable facts); *Latta*, 521 F.2d at 250 (plurality decision) (reasonable belief that such search is necessary-

dence based on the grounds of "constructive custody," "waiver" or "implied consent." *See*, 3 W. LaFave, *Search and Seizure*, Section 10.10 (1978); 1 W. Ringel, *Searches and Seizures, Arrests and Confessions*, Section 17.3 (1966). Based on the reasoning employed in *Terrell*, we rely not on these theories, but rather on the nature of probation.

5. The following cases uphold warrantless searches by parole or probation agents where the police provided the information justifying the search. *United States ex rel. Sanna v. New York State Bd. of Parole*, 441 F.2d 1216, 1218 (2nd Cir.1971); *People v. Adams*, 36 A.D.2d 704, 319 N.Y.S.2d 372 (1971).

6. Some courts have justified warrantless searches of a probationer's or parolee's rea-

sonable grounds to believe that the probationer has contraband or his residence.

The Department of Health and Social Services has promulgated a rule which allows probation agents to search a probationer's residence "if there are reasonable grounds to believe that the quarters ... contain contraband." Section HSS 328.21(3)(a), Wis.Adm.Code.[7] Contraband is defined as "[a]ny item whose possession is forbidden by law." Section HSS 328.16(1)(b), Wis.Adm.Code. Section 941.29(2), Stats., makes it unlawful for a convicted felon to possess a firearm. An administrative agency is bound by its regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-540, 79 S.Ct. 968, 973-974, 3 L.Ed.2d 1012 (1959).

We agree with the court of appeals' decision in this case, and we conclude that the reasonable grounds standard in the Administrative Code is less than the probable cause standard needed to obtain a warrant. The notes to Section HSS 328.21 provide that "[a]lthough it is preferable to have searches and seizure[s] conducted by law enforcement authorities, *that may not always be feasible or advisable*. It is therefore deemed important to give field staff the authority to conduct reasonable searches at reasonable times." (Emphasis added.) The note further provides that although discovery of contraband is important, unsupervised searches should not be allowed. The note then cites *Terrell* for the proposition that a less stringent standard for an agent's search is appropriate.

[2] We hold that the "reasonable grounds" standard of section HSS 328.21(3)(a), Wis.Adm.Code, meets the constitutional standard of reasonableness. Section HSS 328.21(6), Wis.Adm.Code, provides the following guidelines for implementing the test:

"(6) CONTRABAND. In deciding whether there are reasonable grounds to believe that a client possesses contraband or

based on specific facts, although a "hunch" by the parole officer may be sufficient); *Hollins v. Bureau of Corrections*, 365 F.Supp. 1022, 1028 (E.D.Wis.1983) (reasonableness standard); *Anderson*, 586 P.2d at 305 (reasonable grounds); *Powers*, 457 P.2d at 1101 (reasonable grounds); *Velasquez*, 472 P.2d at 1280 (reasonable grounds which is defined as a reasonable suspicion); *Stevens*, 516 P.2d at 1095-1096 (well founded suspicion). In analyzing the reasonableness of the seizure in *Terrell*, this court stated that the "application of a less stringent standard for the probation agent's search or seizure is appropriate because of the nature of probation." *Terrell*, 74 Wis.2d at 655, 247 N.W.2d 696.

Defendant argues that in *Boggess*, 115 Wis.2d at 445, 340 N.W.2d 516, this court determined that the "totality of the circumstances" analysis used in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), is to be used in determining the reasonableness of a search. The Supreme Court in *Gates* used the totality of the circumstances test for the purpose of determining whether probable cause existed to issue a warrant. *Boggess*, 115 Wis.2d at 452, 340 N.W.2d 516. We distinguish *Boggess* from this case on the facts.

In *Boggess*, the court was confronted with a social worker's and police officer's warrantless entry into the defendant's home to determine the safety and welfare of two children. *Id.* at 445, 340 N.W.2d 516. The defendant in *Boggess* was not on probation. Here we are confronted with a probationer whose liberty and privacy interests are limited by the nature of probation. As stated in *Terrell*, due to the nature of probation, a less stringent standard for a search and seizure is appropriate.

[3] In accordance with the aforementioned cases, we hold that a warrantless search of a probationer's residence may be made by a probation officer based on "rea-

7. Effective May 1, 1986, Section HSS 328.21, Wis.Adm.Code, was repealed and recreated. While the form and numbering of the rule was changed, only minor substantive changes were

evade to the rule in existence on the date of the search. This opinion will cite to the new rule and will make note of any substantive changes that have been made.

that a client's ...ing quarters or property contain contraband, a staff member shall consider:

"(a) The observations of staff members;

"(b) Information provided by informants;

"(c) The reliability of the information relied on. In evaluating reliability, attention shall be given to whether the information is detailed and consistent and whether it is corroborated;

"(d) The reliability of the informant. In evaluating reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information;

"(e) The activity of the client that relates to whether the client might possess contraband;

"(f) Information provided by the client that is relevant to whether the client possesses contraband;

"(g) The experience of a staff member with that client or in a similar circumstance;

"(h) Prior seizures of contraband from the client; and

"(i) The need to verify compliance with rules of supervision and state and federal law." (Emphasis added.)[6]

[4] Finally, we conclude that Mr. Law had "reasonable grounds" to search the probationer's residence. At the motion hearing on August 15, 1982, the trial court found that the search in question was not a police search, and that the purpose of the police officers in going to the probationer's residence was for the protection of Mr. Law and Ms. Johnson. The trial court also found, as a matter of fact, that the tip "that there were ... or maybe there were guns in the probationer's apartment," did not come from an ordinary patrolman, but rather, it came from a detective on the Beloit Police Department. Based on the evidence before it, the trial court determined that the probation officer acted reasonably in making the search.

The question of whether a search is reasonable is a question of constitutional fact, and we review constitutional questions independent of the conclusions made by the lower courts. *State v. Woods*, 117 Wis.2d 701, 715, 345 N.W.2d 457 (1984). However, the trial court's findings of evidentiary or historical facts, relevant to the issue of whether the search was reasonable, will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *See, Id.*, at 710-715, 345 N.W.2d 457.

The record shows that Mr. Law received a telephone call from the Beloit Detective Bureau that the Defendant "may have had" or "had" guns at his residence. Although Detective Pittner, who Mr. Law believed had provided the tip, did not, recall contacting Mr. Law, he did state that he believed that one of his detectives contacted the Probation and Parole Department with the information. The record does not contradict the trial court's finding that Mr. Law received a tip from a detective.

The record before the trial court also supports its finding that this was not a police search. The record shows that Mr. Law testified that he requested police assistance for protection purposes and that the police did not search. The record shows that upon entering Defendant's residence, Mr. Law went to search the kitchen, Ms. Johnson went to search a bedroom, and the officers went into the living room with the Defendant and his woman friend. Upon entering the living room, Mr. Law found the gun in a drawer that was apparently broken, and because it was broken, Mr. Law could see the weapon in the drawer before he opened it. While there is testimony by Mr. Law that an officer pointed in the direction of the table when Mr. Law entered the living room, and testimony by Defendant that an officer informed Mr. Law that there was a gun in the drawer, this evidence does not turn this into a police search. Mr. Law testified that he was already heade.. in that direction. Mr. Law and Ms. Johnson conducted the search and the police were there for protection purpose.

To determine whether Mr. Law had "reasonable grounds" to conduct this warrantless search of Defendant's residence, we turn to the considerations set forth in Section HSS 328.21(6), Wis.Adm.Code. Mr. Law was provided information by an informant, an anonymous detective from the Beloit Detective Bureau. *See*, Section HSS 328.21(6)(b), Wis.Adm.Code. The information was detailed, in that it informed Mr. Law that the Defendant may have guns at his residence, and it came from a source that did not have reason to supply inaccurate information. *See*, Section HSS 328.21(6)(c) and (d), Wis.Adm.Code. Based on this information, it was reasonable for Mr. Law to verify Defendant's compliance with state law, see, Section HSS 328.21(6)(i), by conducting a search. Since Defendant was a convicted felon, it was unlawful for him to possess a firearm.

Here, Mr. Law had information that the Defendant may have a weapon, which could have been used to injure or kill another. "That weapons be kept out of the hands of clients is critical for the safety of others. Contraband must also be kept out of the hands of clients so they may be better able to effectively participate in jobs, schooling or training, and other programs." Note to Section HSS 328.21. A probation agent has a duty to see that a probationer is complying with the terms of his probation. The search conducted here was constitutional.

The decision of the court of appeals is affirmed.

SHIRLEY S. ABRAHAMSON, Justice (dissenting).

I agree with the majority that the fourth amendment governs probation searches. I agree with the majority that probationers have an expectation of privacy but that their expectation is not the same as that of other citizens who are not on probation. I agree with the majority that the probation officer must have latitude in observing the probationer and the probationer's home if the probation officer is to exercise his or her supervisory responsibilities.

This case does not, however, involve a probation officer making a home visit, which is generally regarded as an important part of the supervision. This case involves a probation officer making a search of the probationer's home. This kind of supervision is not usual. As the Department of Health and Social Services has stated, "it is preferable to have searches and seizure conducted by law enforcement authorities, [but] that may not always be feasible or advisable." Appendix, Section HSS 328.21, Wis.Adm.Code (Reg., April 1986, No. 364, p. 343.)

I agree with the majority that a full search of the probationer's home is permissible without the usual quantum of probable cause. I depart from the majority because I would require that the evidence be suppressed in a criminal case unless the search was conducted by the probation officer with a warrant unless the case falls within one of the traditional exceptions to the warrant rule, e.g., exigent circumstances. The rule under the constitution is that there should be a warrant. That requirement should not be easily cast aside.

I would allow the probation officer to search a probationer's home if the officer has reasonable cause to believe that the probationer is violating or is in imminent danger of violating a condition of probation and that the officer has reasonable cause to believe that evidence of the violation will be found in the home to be searched. Evidentiary support for the reasonable cause standard need not meet the standards of *Gates*, or *Aguilar-Spinelli*. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). As Judge Hufstedler explained, the standard should be "sufficiently flexible to accommodate the [probation] officer's supervisory obligations, but not so loose as to

6. Under the old rule, Section HSS 328.21(7),

Wis.Adm.Code, the "shalls" were "shoulds."

offer the [prob. or] and his family no protection from arbitrary intrusions by the [probation] officer or from searches that are unjustifiably broad." *Latta v. Fitzharris*, 521 F.2d 246, 257 (9th Cir.1975) (Hufstedler, J. dissenting).

In deciding whether to issue the warrant and in defining its terms, the judge would take into account the strength of the showing of reasonable cause and such additional factors as the nature of the probation violation suspected, the extent to which persons other than the probationer would have their privacy invaded by the search, and the existence of means less intrusive than the search to meet the probation officer's supervisory responsibilities. The issuance of a warrant on this kind of showing is not an undue burden on the probation officer and provides the protection for the probationer guaranteed by the constitutions. Requiring an officer to articulate reasons for the search is a deterrent to impulsive or arbitrary governmental conduct—and that is what the fourth amendment is about. Upholding the warrant requirements for searches of the probationer's home does not impede the dual goals of probation, protecting the public and rehabilitation. *Latta, supra* 521 F.2d at 257.

Professor LaFave characterizes Judge Hufstedler's dissent in the *Latter* case as "cogently reasoned." *Search and Seizure*, sec. 10.10, p. 441 (1978). I am persuaded by her dissent and the similar reasoning in *United States v. Ban*, 670 F.2d 982 (3d Cir.1982).

Because there was a search of this probationer's home without a warrant and there is no claim that the case falls within one of the exceptions to the warrant requirement, I would suppress the evidence.

Even if I were to agree with the majority that no warrant was needed, I would have to dissent because the facts in this case do not satisfy the tests set forth by the majority and the Department of Health and Social Services.

BABLITCH, Justice (dissenting).

The facts in this case do not meet the majority's own test for reasonable grounds justifying the probation officers to search Griffin's residence for contraband nor do the facts satisfy the Department of Health and Social Services' (DHSS) standards for reasonable grounds to believe that a probationer possesses contraband. Section HSS 21(3)(a), Wis.Adm.Code.

The only basis for the fulltimers, warrantless search of Griffin's home by probation officers was the supervisor's testimony that a police detective told him that Griffin "may have had guns in his apartment." Nothing more. We do not know which detective telephoned the probation department with this information. We do not know the source of the detective's information. We do not know any fact which indicates that the probation supervisor had reason to believe that Griffin ever had anything to do with guns.

The facts in this case fail to satisfy any of nine standards in sec. HSS 21(6), Wis. Adm.Code, which sets forth the DHSS's guidelines for implementing the test for reasonable grounds for a search which the majority adopts. Maj. op. at p. 842. First, the record indicates that the probation staff did not rely on observations of its own members in any respect, in disregard of sec. HSS 21(6)(a). Second, although sec. HSS 21(6)(b) authorizes the department to consider "information provided by informants," the record does not establish that the department tested the "information" on which it acted by asking for any detail whatsoever. Third, the record shows that the probation staff did not try to evaluate the reliability of the detective's information or corroborate the tip in any manner, in violation of sec. HSS 21(6)(c). Fourth, the record lacks any suggestion that the probation officers tried to evaluate the reliability of their informant, in disregard of sec. HSS 21(6)(d). Fifth, the record shows no reason for the department to conclude from Griffin's past activities that he might possess a gun in his apartment, as required by sec. HSS 21(3)(e). Sixth, the record lacks any indication that Griffin provided the probation department any information relevant

to whether possessed a gun, as required by sec. Sec.21(6)(f). Seventh, nothing in the record shows that the probation staff relied on experience with Griffin or another probationer in similar circumstances to justify a search, as sec. HSS 21(6)(g) permits. Eighth, the record does not show any prior seizures of guns from Griffin, which might make a search reasonable under sec. HSS 21(6)(h). Finally, there is no fact in this record which suggests that the department justified its search of Griffin's apartment by any specific need to verify whether he was complying with the rules of his supervision or state and federal law, which sec. HSS 21(6)(i) allows.

For this reason, I cannot conclude that the search of Griffin's apartment meets even the minimal standard which the majority now adopts.

In re the marriage of Florence S. BUTTON, Petitioner-Appellant,
v.
Charles H. BUTTON, Respondent.
No. 84-2337.
Supreme Court of Wisconsin.
Argued April 29, 1986.
Decided June 30, 1986.

Parties sought divorce. The Circuit Court, Walworth County, Robert D. Read, J., divided property upon divorce in accordance with terms of postnuptial property agreement and wife appealed. After taking jurisdiction of the appeal upon certification by the Court of Appeals, 378 N.W.2d 284, the Supreme Court, Shirley S. Abrahamson, J., held that: (1) property agreement is inequitable, and thus not binding, if parties have not reasonably disclosed their financial status, if agreement was not entered into voluntarily and freely, or if substantive provisions of agreement were unfair to each spouse, and (2) fairness of substantive provisions of agreement is to be determined at time of agreement and, if circumstances significantly change, also at time of divorce.

Reversed and remanded.

1. Husband and Wife ⇐230

Postnuptial agreement is inequitable and thus not binding, if it fails to satisfy any one of the following requirements: each spouse has made fair and reasonable disclosure to other of his or her financial status; each spouse has entered into agreement voluntarily and freely; and substantive provisions of agreement providing property upon divorce are fair to each spouse. W.S.A. 767.255(11).

2. Husband and Wife ⇐230(1), 230

Where it can be shown that spouse had independent knowledge of other spouse's financial status at time of entering into prenuptial or postnuptial agreement, independent knowledge serves as substitute for disclosure for purposes of determining equitableness of agreement. W.S.A. 767.255(11).

3. Husband and Wife ⇐230(1), 230

In determining whether prenuptial or postnuptial agreement was entered into voluntarily and freely, for purposes of determining equitableness of agreement, relevant inquiry is whether each spouse had meaningful choice; some factors to be considered are whether each party was represented by independent counsel, whether each party had adequate time to review agreement, whether parties understood terms of agreement and their effect, and whether parties understood their financial rights in absence of agreement. W.S.A. 767.255(11).

4. Husband and Wife ⇐230(3), 230

In assessing fairness of substantive terms of prenuptial or postnuptial agreement, for purposes of determining whether

136 Wis.2d 62

STATE of Wisconsin,
Plaintiff-Respondent,

v.

Joseph G. GRIFFIN,
Defendant-Appellant.

No. 84-621-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Nov. 9, 1984.

Opinion Released Sept. 12, 1985.

Opinion Filed Sept. 12, 1985.

Review Granted.

Defendant was convicted in the Circuit Court, Rock County, J. Richard Long, J., of possession of firearm by felon, and he appealed. The Court of Appeals, Gartzke, P.J., held that probation officer, consistent with Fourth Amendment and administrative rule, could lawfully search without warrant apartment of defendant, who was on probation, on information from police that defendant had gun in his apartment.

Affirmed.

Dykman, J., dissented and filed opinion.

1. Criminal Law ⇐394.6(1)

Evidence obtained in violation of either state or federal constitutional provision prohibiting unreasonable search and seizures is generally inadmissible and must be suppressed. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

2. Searches and Seizures ⇐7(10)

Chief evil against which Fourth Amendment is directed is physical entry of home. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐982.8

Warrantless search of probationer's dwelling is permissible, regardless of whether innocent third persons are in dwelling. U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐982.8

Probation officers may conduct warrantless search of probationer's dwelling, notwithstanding failure of search to meet one of usual exceptions to warrant requirement, provided that search is otherwise reasonable. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐982.8

In probationer's challenge to search of his dwelling, evidence supported trial court's finding that search of dwelling had been conducted by probation officer, rather than police, and that police were along merely to protect probation officer.

6. Criminal Law ⇐1158(1)

Court of Appeals must accept trial court's reasonable factual inferences from established facts.

7. Criminal Law ⇐982.8

As long as predominant purpose of warrantless search of probationer's dwelling by probation officer is to determine whether probation has been violated, search is valid. U.S.C.A. Const.Amend. 4.

8. Criminal Law ⇐982.8

Warrantless search of probationer's dwelling by probation agent is not invalid merely because evidence seized is used in criminal prosecution. U.S.C.A. Const. Amend. 4.

9. Administrative Law and Procedure ⇐416

Administrative agency is bound by its regulations.

10. Arrest ⇐63.4(2)

In law of arrest, reasonable grounds is equated with probable cause.

11. Criminal Law ⇐982.8

Under administrative rule permitting probation agents to search probationer's living quarters "if there are reasonable grounds to believe that the quarters * * * contain contraband," "reasonable grounds" establishes lesser standard than concept of "probable cause."

12. Criminal Law ⇐734

Where historical facts are undisputed or have been established, whether probation agent had reasonable grounds to believe that probationer's dwelling contained contraband, so as to justify search of dwelling, is question of law.

13. Criminal Law ⇐1134(3)

Court of Appeals decides questions of law without deference to trial court's conclusion.

14. Criminal Law ⇐1158(4)

When reviewing order on motion to suppress evidence, appellate court may take into account evidence at trial, as well as evidence at suppression hearing.

15. Criminal Law ⇐982.8

Probation officer has reasonable grounds to believe that probationer's living quarters contain contraband, so as to justify warrantless search of living quarters, when he is told by police that quarters contain gun.

16. Criminal Law ⇐982.8

Administrative rule permitting probation agents to search probationer's living quarters "if there are reasonable grounds to believe that the quarters * * * contain contraband" was constitutional. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

17. Criminal Law ⇐982.8

Any warrantless search conducted in furtherance of purposes of probation must be carried out in reasonable manner. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

Alan G. Habermehl and Kalal & Habermehl, Madison, for defendant-appellant.

Bronson C. La Follette, Atty. Gen., and Barry M. Levenson, Asst. Atty. Gen., for plaintiff-respondent.

Before GARTZKE, P.J., and DYKMAN, J., and BRUCE F. BEILFUSS, Reserve Judge.

GARTZKE, Presiding Judge.

Joseph Griffin appeals from a judgment convicting him of possession of a firearm as a convicted felon. Sec. 941.29(2), Stats. Griffin was previously convicted of possession of heroin with intent to deliver, a felony, and was on probation for resisting arrest, disorderly conduct and obstructing an officer. Probation agents found a pistol in Griffin's apartment during a warrantless search. The trial court denied Griffin's motion to suppress the pistol as evidence.

Griffin contends that a warrant is constitutionally required to search a probationer's residence. Alternatively, he argues that even without a warrant requirement the search was unlawful because it was not based upon probable cause, or, at a minimum, a reasonable belief that contraband was present. The state asserts that because Griffin was on probation, the warrantless search in accordance with the rules of the Department of Health and Social Services was constitutional. We conclude that probation agents could lawfully search Griffin's apartment without a warrant on information from the police that he had a gun in his apartment. We therefore affirm.

A probation supervisor testified at the suppression hearing that a detective in the Beloit police department telephoned him that the police had information that Griffin "may have had guns" in his apartment. The supervisor requested police protection for a search. Two or three hours later, the supervisor, a probation agent and three plainclothes police officers went to Griffin's apartment. When Griffin answered the door, they identified themselves and said they were going to search the residence. The police stayed in the living room with Griffin, his child and a woman living with him, while the supervisor and agent searched the apartment. After the supervisor returned to the living room, an officer pointed to a partially open table drawer, in which the supervisor found the pistol. The supervisor directed the officers to arrest Griffin.

The trial court found that the police were present to protect the probation agents at the latters' request and that a police search had not occurred. The court concluded that the warrantless search was reasonable because probation agents have a duty to determine whether a probationer is violating the law or the conditions of probation and because they relied on information from a detective that guns were or may be in Griffin's apartment. The trial court therefore refused to suppress the gun as evidence. Griffin was tried and convicted, and this appeal resulted.

1. *Warrantless Search by Probation Agents Permitted*

[1] Griffin's motion to suppress is based on the fourth and fourteenth amendments to the United States Constitution[1] and Wis. Const. art. I, sec. 11. The provisions of the fourth amendment to the United States Constitution and Wis. Const. art. I, sec. 11, prohibit unreasonable search and seizure and are almost identical. Evidence obtained in violation of either provision is generally inadmissible and must be suppressed.

[2] The chief evil against which the fourth amendment is directed is the physical entry of the home. *Welsh v. Wisconsin*, 466 U.S. 740, ——, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732, 742 (1984).

And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. *See Johnson v. United States*, 333 U.S. 10, 13-14 [68 S.Ct. 367, 368-69, 92 L.Ed. 436] (1948). It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. [573,] 586 [100 S.Ct. 1371, 1380, 63 L.Ed.2d 639] [1980]. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 [91 S.Ct. 2022, 2042, 29 L.Ed.2d 564] (1971)....

Welsh, 466 U.S. at ——, 104 S.Ct. at 2097, 80 L.Ed.2d at 742 (footnote omitted).

Exceptions to the warrant requirement are "few in number and carefully delineated," *United States v. United States District Court*, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972), and have been "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958). The exceptions recognized by the United States Supreme Court include search based on consent, search incident to a lawful arrest, a search in hot pursuit, exigent circumstances and seizure of evidence in plain view. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) (consent); *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201, 1219 (1983) (limited search incident to lawful arrest); *Texas v. Brown*, 460 U.S. 730, 735-36, 103 S.Ct. 1535, 1539-40, 75 L.Ed.2d 502 (1983) (hot pursuit); *New York v. Belton*, 453 U.S. 454, 457, 101 S.Ct. 2860, 2862, 69 L.Ed.2d 768 (1981) (exigent circumstances); and *Washington v. Chrisman*, 455 U.S. 1, 5-6, 102 S.Ct. 812, 815-16, 70 L.Ed.2d 778 (1982) (plain view). The state makes no claim that any of these exceptions applies to the facts before us.

The United States Supreme Court has not declared whether the status of a probationer or parolee is a basis for an additional exception to the warrant requirement.[2] This, of course, need not deter us from deciding whether the exception exists. *See*

1. The provisions of the fourth amendment apply to the states through the Due Process Clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

2. The cases indicate that probation and parole are the same or fail to distinguish between them for purposes of deciding whether a warrantless search of a dwelling is constitutional. *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 265-66 (9th Cir.1975); *State v. Malone*, 403 So.2d 1234, 1238 (La.1981); *Sarn v. State*, 91 Nev. 89, 590 P.2d 1152, 1154 (1979); *State v. Simms*, 10 Wash.App. 75, 516 P.2d 1088, 1091 (1973).

State v. Prober, 98 Wis.2d 345, 360-61, 297 N.W.2d 1, 9 (1980) (medical emergency exception exists for warrantless search of home, notwithstanding lack of United States Supreme Court precedent). The existence and circumstances of such an exception have been the subject of considerable discussion at other levels. *See* 3 W. LaFave, *Search and Seizure* sec. 10.10, at 421 (1978). LaFave concludes:

> Although there is some authority to the effect that the Fourth Amendment rights of probationers and parolees are of precisely the same scope and dimension as those of the public at large, the weight of authority is to the contrary .... And while there is some disagreement as to whether a probationer's Fourth Amendment rights are diminished to the same extent and degree as those of a parolee, there is considerable authority supporting the proposition that probationers may lawfully be subjected to searches which, absent their probation status, would be deemed unlawful because of the absence of probable cause or a search warrant or both.

Id. at 421-22 (footnotes omitted).

Most state and federal courts faced with the issue have held that probation or parole agents may conduct a warrantless search of the dwelling of a probationer or a parolee. *See, e.g., Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975); *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir.1982); *Roman v. State*, 570 P.2d 1235, 1242 (Alaska 1977) (dicta); *State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329, 1330 (1977); *People v. Mason*, 5 Cal.3d 759, 97 Cal.Rptr. 302, 306, 488 P.2d 630, 634 (1971), *cert. denied*, 405 U.S. 1016, 92 S.Ct. 1299, 31 L.Ed.2d 478 (1972); *People v. Anderson*, 189 Colo. 34, 536 P.2d 302, 305 (1975); *Grubbs v. State*, 373 So.2d 905, 907 (Fla.1979) (use of evidence obtained limited to probation or parole revocation proceeding); *State v. Fields*, 686 P.2d 1379, 1389 (Hawaii 1984); *State v. Malone*, 403 So.2d 1234, 1239 (La.1981) (yard); *People v. Richards*, 76 Mich.App. 665, 256 N.W.2d 793, 795 (1977); *State v. Earnest*, 293 N.W.2d 365, 369 (Minn.1980) (evidence obtained used in a probation revocation proceeding); *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285, 289 (1980); *Himmage v. State*, 88 Nev. 296, 496 P.2d 763, 766 (1972); *People v. Huntley*, 43 N.Y.2d 175, 401 N.Y.S.2d 31, 34, 371 N.E.2d 794, 796 (1977); *State v. Perbix*, 331 N.W.2d 14, 21 (N.D.1983); *State v. Culbertson*, 29 Or.App. 363, 563 P.2d 1224, 1229 (1977) (dicta); *State v. Cummings*, 262 N.W.2d 56, 61 (S.D.1978); *State v. Velasquez*, 672 P.2d 1254, 1260 (Utah 1983); *State v. Simms*, 10 Wash.App. 75, 516 P.2d 1088, 1094 (1973).

Some courts permit police to make a warrantless search of a probationer's or parolee's dwelling. *See, e.g., Owens v. Kelley*, 681 F.2d at 1368; *State v. Montgomery*, 566 P.2d at 1331; *People v. Mason*, 488 P.2d at 631; *People v. Richards*, 256 N.W.2d at 795; *State v. Morgan*, 295 N.W.2d at 289; *Sarn v. State*, 95 Nev. 89, 590 P.2d 1152, 1155 (1979) (dicta); *State v. Perbix*, 331 N.W.2d at 21. *Contra, e.g., U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir.1975) (en banc); *Roman v. State*, 570 P.2d at 1243; *People v. Anderson*, 536 P.2d at 305; *Grubbs v. State*, 373 So.2d at 909; *State v. Fields*, 686 P.2d at 1388; *State v. Velasquez*, 672 P.2d at 1262.

Under the minority view, no exception to the warrant requirement applies to probationers or parolees, and a warrantless search may not be made of such a person's dwelling unless one of the judicially recognized exceptions is met. *See, e.g., U.S. v. Reo*, 678 F.2d 382, 387-88 (2d Cir.1982); *U.S. v. Bradley*, 571 F.2d 787, 789 (4th Cir.1978); *State v. Culhane*, 173 N.W.2d 533, 537 (Iowa), *cert. denied*, 396 U.S. 933, 90 S.Ct. 1841, 26 L.Ed.2d 270 (1970); *State v. Fogarty*, 187 Mont. 293, 610 P.2d 140, 144 (1980); *Tamez v. State*, 534 S.W.2d 686, 692 (Ct.App.Tex.1976).

The Wisconsin Supreme Court recognizes an exception to the warrant requirement which allows probation agents to search or seize a probationer, provided that the search or seizure itself is reasonable. *State v. Tarrell*, 74 Wis.2d 647, 654-55, 247

N.W.2d 696, 701 (1976). The *Torvell* court reasoned as follows:

> If there is to be an exception to the requirements of the fourth amendment granting probation agents a limited right to search or seize a probationer without a warrant, the foundation for this exception lies in the nature of probation itself. Probation, like parole, "is an integral part of the criminal justice system and has as its object the rehabilitation of those convicted of crime and the protection of the state and community interest." *State ex rel. Niedever v. Cady*, 72 Wis.2d 311, 322, 240 N.W.2d 626, 633 (1976). While probation is a privilege, not a matter of right, once it has been granted this conditional liberty can be forfeited only by breaching the conditions of probation. A sentencing judge may impose conditions which appear to be reasonable and appropriate. Sec. 973.09, Stats. A sentence of probation places the probationer "in the custody of the department" subject to the conditions of probation and rules and regulations of the Department of Health & Social Services. Sec. 973.10. All conditions, rules and regulations must be imposed with the dual goal of rehabilitation of the probationer and protection of the public interest. The imposition of these conditions, rules and regulations demonstrates that while a probationer has a conditional liberty, this liberty is neither as broad nor as free from limitations as that of persons who have not committed a crime. The expectations of privacy of a person on probation cannot be the same as the expectations of privacy of persons not on probation. It is only the reasonable expectations of privacy which the fourth amendment protects. Conditions of probation must at times limit the constitutional freedoms of the probationer. Necessary infringements on these freedoms are permissible as long as they are not overly broad and are reasonably related to the person's rehabilitation. By the very nature of probation, limitations on the liberty and privacy of probationers are imposed. These limitations are the bases for an exception to the warrant requirement of the fourth amendment.

Id. at 653–54, 247 N.W.2d at 700–701 (footnotes omitted).

Torvell involved a personal search and seizure of a probationer, not the warrantless search of a probationer's dwelling. Special considerations attend a home which do not apply to a search or seizure conducted elsewhere. "Cases involving searches for articles of personal property make clear that, under the fourth amendment, one's home is entitled to special dignity and sanctity." *Leasch v. State*, 84 Wis.2d 587, 594, 267 N.W.2d 278, 282 (1978). Sanctity attends the home. *Welsh v. Wisconsin*, 466 U.S. at ——, 104 S.Ct. at 2097, 80 L.Ed.2d at 743; *Payton v. New York*, 445 U.S. at 588–89, 100 S.Ct. at 1381. *Torvell* is not authority for the proposition that probation agents may search a probationer's home without a warrant, in the absence of other circumstances which would permit the intrusion.

[3] The *Torvell* opinion leads us to conclude, however, that a warrantless search of a probationer's dwelling is permissible. The *Torvell* court employed the reasoning of two lead opinions on the point: *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.1975), and *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir.1975). *Torvell*, 74 Wis.2d at 652 n. 1 (citing *Consuelo-Gonzalez*), 655 n. 5 (citing *Latta*), 247 N.W.2d at 700–01. The *Latta* court recognized that parolees possess fourth amendment protections but concluded that the relationship between the parole officer and the parolee precludes deciding the propriety of a warrantless search by automatic reference to the law of ordinary search and seizure. 521 F.2d at 250–51. The court held that a parole officer need not obtain a warrant before making an otherwise reasonable search of a parolee's dwelling. *Id.* In *U.S. v. Consuelo-Gonzalez, supra*, the court applied the same rationale to the warrantless search of a probationer's dwelling, emphasizing the dual goals of probation: rehabilitation of a

convicted person and protection of the public. 521 F.2d at 264–66.[5]

We reject Griffin's argument that because innocent third persons were in his apartment, a warrant was necessary. Only one court, *State v. Fogarty*, 610 P.2d at 152, has so held. A second court, *State v. Velasquez*, 672 P.2d at 1260 n. 8, has said in dictum that caution would suggest that a warrant be obtained under those circumstances. In our view, because any search, with or without a warrant, can affect innocent third persons, no reason exists to require a warrant to protect the rights of those persons. *See People v. Mason*, 488 P.2d at 634.

[4] We conclude that probation officers may conduct a warrantless search of a probationer's dwelling, notwithstanding failure of the search to meet one of the usual exceptions to the warrant requirement, provided that the search is otherwise reasonable.

Griffin contends that the warrantless search of his apartment must be deemed to have been made by the police rather than probation agents. He treats the issue as one of law. He asserts that his conclusion is compelled because the police had foreknowledge of, acquiesced in, and, in his view, actively participated in the search, and because the state seeks to use the evidence seized in a criminal prosecution. We reject his contention.

[5, 6] The trial court found that this was not a police search. That finding is tantamount to a factual inference from the established facts. The inference is that the search was made as part of the probation process rather than for law enforcement purposes. Treated as a factual inference, it is reasonable. We must accept the trial court's reasonable factual inferences from the established facts. *C.R. v. American Standard Ins. Co.*, 113 Wis.2d 12, 15, 334 N.W.2d 121, 123 (Ct.App.1983).

[7] Other courts have held that the police may accompany a parole officer when a search is made. *People v. Anderson*, 586 P.2d at 905. As long as the predominant purpose is to determine whether probation has been violated, the search is valid. *Seim v. State*, 590 P.2d at 1155–56. The *Latta* court sustained a search by a parole officer accompanied by police, where the parole officer was not a "stalking horse" for the police. 521 F.2d at 247. The *Consuelo-Gonzalez* court recognized that a proper visitation by a probation officer did not cease to be so because he is accompanied by a law enforcement official unless the cooperation is a subterfuge for criminal investigation. 521 F.2d at 267. *Compare*

5. The *Consuelo-Gonzalez* court invalidated a warrantless search for contraband by law enforcement officers under the Federal Probation Act, 18 U.S.C. sec. 3651. The court reiterated the *Latta* holding that a probation officer could have conducted a warrantless search of the defendant's dwelling and expressed no opinion regarding the extent to which a state may constitutionally allow a warrantless search by police of a probationer's residence. 521 F.2d at 266.

6. By statute, a probationer is "in the custody of the department" of health and social services and subject to its control "under the conditions set by the court of rules and regulations established by the department." Some courts rely on constructive custody, waiver or consents to justify warrantless searches of probationers' and parolees' dwellings. *See, e.g., People v. Mason*, 488 P.2d at 634 (waiver of fourth amendment rights); *People v. Hernandez*, 229 Cal.App.2d 143, 40 Cal.Rptr. 180, 183–84 (1964), *cert. denied*, 381 U.S. 953, 85 S.Ct. 1810, 14 L.Ed.2d 725 (1965) (constructive custody); *People v. Richards*, 256 N.W.2d at 795 (consent). The reasoning in *State v. Torvell*, that probationers have a reduced expectation of privacy based on the nature of probation itself, has been described as a "balancing theory." *See* 3 W. LaFave, *Search and Seizure* sec. 10.10(c), at 431 (1978), 1 W. Ringel, *Searches and Seizures, Arrests and Confessions* sec. 17.3, at 17–10 (1984). We think the trend is toward the balancing theory. Sec. 973.10(1), Stats. *See, e.g., Latta v. Fitzharris*, 521 F.2d at 249 (purposes of parole system justify invasion of privacy); *Owens v. Kelley*, 681 F.2d at 1367 (rehabilitation of probationer and protection of society); *Rowan v. State*, 570 P.2d at 1242 n. 20 (rehabilitation and protection); *State v. Fields*, 686 P.2d at 1390 (probation presupposes a partial surrender of privacy); *State v. Earnest*, 293 N.W.2d at 360 (special relationship between probation officer and probationer); *State v. Simms*, 516 P.2d at 1004 (parolee's status and rehabilitative role of probation).

Roman v. State, 870 P.2d at 1343 (right to search is limited to parole officers but includes peace officers acting under their direction); *State v. Turner*, 142 Ariz. 138, 688 P.2d 1080, 1085 (Ct.App.1984) (search not invalid because of police assistance); *State v. Howard*, 79 Cal.App.3d 46, 143 Cal.Rptr. 842, 843 (1978) (police search at request of probation officer valid); *State v. Simms*, 516 P.2d at 1095 (parole officer may enlist aid of police officer in performing his duty); *Sanderson v. State*, 649 P.2d 677, 679 (Wyo.1982) (police search at probation officer's request held part of probation process).

[8] Nor is a warrantless search by a probation agent invalidated because the evidence seized is used in a criminal prosecution. "To hold that evidence obtained by a parole officer in the course of carrying out the duty cannot be utilized in a subsequent prosecution because evidence obtained directly by the police in such a manner would be excluded, would unduly immunize parolees from conviction." *United States ex rel. Santos v. New York State Bd. of Par.*, 441 F.2d 1216, 1218 (2d Cir.1971), *cert. denied*, 404 U.S. 1025, 92 S.Ct. 692, 30 L.Ed.2d 676 (1972). *See also, Latta v. Fitzharris*, 521 F.2d at 382-83 (evidence seized in valid search by parole officer may be used in criminal prosecution); *People v. Anderson*, 536 P.2d at 305 (evidence is admissible in the prosecution of another crime); *State v. Perkis*, 331 N.W.2d at 22 (evidence seized in valid search for probation violation may be used in new criminal prosecution); *State v. Velasquez*, 672 P.2d at 1362-63 (that evidence seized is beneficial to police or is used in criminal prosecution does not invalidate warrantless search of parolee's apartment).

2. Grounds for Warrantless Search of Probationer's Dwelling—Compliance with Departmental Rules

The supervisor testified that the search was conducted under rules adopted by the Department of Health and Social Services. The pertinent rule is Wis.Adm.Code sec. HSS 328.21(4), which permits probation agents to search a probationer's living quarters "if there are reasonable grounds to believe that the quarters ... contain contraband."[6] Contraband includes any

9. HSS 328.21 Search and seizure. (1) A search of a client, client's living quarters, or property may be made at any time, but only in accordance with this section.

(4) A search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances require search without approval.

(a) There shall be a written record of all searches of a client's living quarters or property. This record shall be prepared by the staff member who conducted the search and shall be filed with the agent's supervisor. If the search was conducted without the supervisor's approval because of exigent circumstances, a report stating what the exigent circumstances were shall be part of the record and shall be filed with the supervisor within 48 hours of the search. The report shall state:

1. The identity of the client whose living quarters or property was searched;

2. The identity of the staff member who conducted the search and the supervisor, if any, who approved it;

3. The date, time, and place of the search;

4. The reason for conducting the search. If the search was a random one, the report shall so state;

5. Any items seized pursuant to the search; and

6. Whether any damage was done to the premises or property during the search.

(b) If any items are damaged pursuant to the search of a client's living quarters or property, the client shall be informed in writing what those items are.

(c) In conducting searches, field staff shall disturb the effects of the client as little as possible, consistent with thoroughness.

(d) During searches, staff shall not read any legal materials, communication between the client and an attorney, or any materials prepared in anticipation of a lawsuit. This does not include business records.

(e) If the client whose living quarters or property is being searched is not present, the agent may not forcibly enter the premises. A search should normally be conducted in the presence of another person.

(5) Field staff shall strive to preserve the dignity of clients in all searches conducted under this section.

(6) Whenever feasible, before a search is conducted under this section, the client shall be informed that a search is about to occur.

item whose possession is forbidden by law. Wis.Adm.Code sec. HSS 328.16(1)(b). It is generally unlawful for a convicted felon to possess a firearm. Sec. 941.29(2), Stats.

[9] An administrative agency is bound by its regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959). Consequently, the search cannot be valid unless the probation agents had "reasonable grounds to believe" that Griffin's apartment contained contraband. Wis.Adm.Code sec. HSS 328.21(4). Only if this standard is met need we examine whether the search is otherwise reasonable.

[10, 11] In the law of arrest, reasonable grounds is equated with probable cause. *State v. Dragovich*, 104 Wis.2d 247, 255, 311 N.W.2d 243, 247 (Ct.App.1981). That is not the meaning of the standard in Wis.Adm.Code sec. HSS 328.21(4). The Note to HSS 328.21 states:

> Although it is preferable to have searches and seizure conducted by law enforcement authorities, that may not always be feasible or advisable, and it is deemed important to give field staff the authority to conduct reasonable searches at reasonable times. Experience teaches that these searches may be necessary because contraband, including drugs and weapons, may be discovered during these searches. These searches are thought to deter the possession of contraband.

The contrast in the Note between police searches and staff searches shows that the reasonable grounds standard in HSS 328.21 is less than probable cause.

[12, 13] If, as here, the historical facts are undisputed or have been established, whether the agents had reasonable grounds to believe that Griffin's apartment contained contraband is a question of law. *Compare State v. Dragovich*, 104 Wis.2d at 262, 311 N.W.2d at 250 (probable cause for arrest is a question of law if historical facts are undisputed). We decide questions of law without deference to the trial court's conclusions.

Griffin contends that the probation supervisor lacked reasonable cause because he testified at the evidentiary hearing that an unnamed police officer had said that defendant "may have had guns" in his residence. To rely on that indefinite statement is unreasonable in Griffin's view.

[14] The trial record shows that the supervisor had definite information that Griffin had a gun in his apartment. When reviewing an order on a motion to suppress evidence, an appellate court may take into account the evidence at the trial, as well as the evidence at the suppression hearing. *Carroll v. U.S.*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925); *U.S. v. Caruso*, 470 F.2d 1224, 1226 (2d Cir.1972); *U.S. v. Pearson*, 448 F.2d 1297, 1250 (9th Cir.1971); *Rhodes v. U.S.*, 387 F.2d 1019, 1021 (9th Cir.1967), *cert. denied*, 390 U.S. 1004, 88 S.Ct. 1247, 20 L.Ed.2d 104 (1968); *U.S. v. Smith*, 527 F.2d 692, 694 (10th Cir.1975). At the trial, the supervisor testified that the detective who called him said

> whether the informant has supplied reliable information in the past, and whether the informant has reason to supply reasonable information;
>
> (e) The activity of the client that relates to whether the client might possess contraband;
>
> (f) Information provided by the client which is relevant to whether the client possesses contraband;
>
> (g) The experience of a staff member with that client or in a similar circumstance;
>
> (h) Prior seizures of contraband from the client; and
>
> (i) The need to verify compliance with rules of supervision and state and federal law.

"they had information that Mr. Griffin had [a gun] in his possession at his residence."

Griffin argues that to have reasonable cause, the supervisor needed more than the detective's statement that a gun was in Griffin's apartment. He asserts that we should apply the "totality of circumstances" analysis in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Our state supreme court used that test when determining whether a reasonable person would have believed that an emergency existed which created a need for aid. *State v. Boggess*, 115 Wis.2d 443, 455, 340 N.W.2d 516, 523 (1983).

We will not apply the "totality of circumstances" analysis created in *Illinois v. Gates, supra*. That analysis is used to determine whether a magistrate may conclude that probable cause exists to issue a warrant. We deal with the lesser standard of reasonable cause for a warrantless entry. The *Boggess* court dealt with a warrantless entry by a social worker and police officers for the safety and welfare of children. We deal with entry of the home of a person who is not entitled to the protection of a warrant and with a search required by the needs of probation.

Wisconsin Adm.Code sec. HSS 328.21(7) directs that a probation agent consider "[t]he need to verify compliance with rules of supervision and state and federal law" when determining whether reasonable grounds exist to believe that a client's living quarters contain contraband. That need is extremely high when the agent believes that a firearm is in a probationer's home. As stated in the Note to sec. HSS 328.21:

> Contraband, particularly weapons, may be used to threaten, injure, or kill another. That weapons be kept out of the hands of clients is critical for the safety of others. Contraband must also be kept out of the hands of clients so they may be better able to participate in jobs, schooling or training, and other programs effectively.

[15] We hold that a probation officer has reasonable grounds to believe that a probationer's living quarters contain contraband when told by the police that the quarters contain a gun. The search therefore met the requirements of the administrative regulation under which it was conducted, Wis.Adm.Code sec. HSS 328.21(4).

3. "Reasonable Grounds to believe" Sufficient for Warrantless Search

[16] Other courts which permit a warrantless search of a probationer's dwelling also hold that the search may be constitutionally made on less than probable cause to believe that a probation violation has occurred. Those courts variously describe the appropriate standard. *See, e.g., Latta v. Fitzharris*, 521 F.2d at 250 (reasonable belief that search is necessary but parole officer's "hunch" said to be sufficient); *People v. Anderson*, 526 P.2d at 305 (reasonable grounds); *State v. Fields*, 686 P.2d at 1290 (reasonable suspicion supportable by specific and articulable facts); *State v. Malone*, 460 So.2d at 1220 (reasonable suspicion); *State v. Williams*, 486 S.W.2d 468, 473 (Mo.1972) (sufficient information to arouse suspicion); *State v. Culbertson*, 960 P.2d at 1229 (minimal information or even spot checking as dictated by experience); *State v. Velasquez*, 672 P.2d at 1260 (reasonable suspicion); *State v. Simms*, 516 P.2d at 1096 (well-founded suspicion).

Some courts allow a warrantless search of a probationer's dwelling even if no grounds exist to believe that a probation violation has occurred. The eleventh circuit finds no constitutional requirement even of reasonable suspicion, if the search is performed in a reasonable manner. *Owens v. Kelley*, 681 F.2d at 1366–69. *See also People v. Mason*, 488 P.2d at 634 (probationer held to have consented to condition permitting searches whenever requested by police officers); *State v. Morgan*, 293 N.W.2d at 206 (condition authorizing search "with or without probable cause" held valid); *State v. Purbus*, 331 N.W.2d at 21 (searches permitted without reasonable suspicion).

The "reasonable grounds to believe" standard in Wis.Adm.Code sec. HSS 328.21(4) is, however, the minimum we should consider. It binds probation agents in this state. Because the Department of Health and Social Services must abide by its own regulations, we need not decide whether a lesser standard is acceptable.

The many decisions we have already cited show that a "reasonable" standard or one comparable to it has been held to be constitutionally acceptable. The reasonable standard adopted by the department should adequately protect probationer from intrusions of their dwellings without grounds and from harassment by probation agents. We approve it.

4. Reasonableness of Search Itself

[17] The time, manner and scope of the search are not challenged on appeal and we therefore do not reach the reasonableness of the search itself. Any warrantless search conducted in furtherance of the purposes of probation must, of course, be carried out in reasonable manner. *Owens v. Kelley*, 681 F.2d at 1368–69; *Latta v. Fitzharris*, 521 F.2d at 252.

Because we conclude that the search was valid under the fourth amendment, we affirm the judgment appealed from.

Judgment affirmed.

DYKMAN, Judge (dissenting).

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment does not contain an escape clause for warrantless searches of probationers' homes, nor does it suggest that the term "probable cause" may be interpreted to mean "hunch" or "guess." There is no constitutional language suggesting a difference between parole officers and police.[1] The prohibition is against unreasonable searches, and a prescribed quantum of evidence is required for the search.

The United States Supreme Court has recently said:

> It is axiomatic that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for

1. The majority finds it significant that a parole officer rather than a police officer searched defendant's residence. This distinction is not relevant to a fourth amendment analysis. In *New Jersey v. T.L.O.*, — U.S. —, —, 105 S.Ct. 733, 740, 83 L.Ed.2d 720, 730 (1985), the court said:

> It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. *See United States v. Chadwick*, 433 U.S. 1, 7–8, 53 L.Ed.2d 538, 97 S.Ct. 2476 [2481] (1977); *Boyd v. United States*, 116 U.S. 616, 624–629, 29 L.Ed. 746, 6 S.Ct. 524 [526–31] (1886). [T]his Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is,

> "upon the activities of sovereign authority." *Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L.Ed. 1048, 41 S.Ct. 574 [576], 13 A.L.R. 1159 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, *see Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L.Ed.2d 930, 87 S.Ct. 1727 [1730] (1967); OSHA inspectors, *see Marshall v. Barlow's Inc.*, 436 U.S. 307, 313-313, 56 L.Ed.2d 305, 98 S.Ct. 1816 [1820] (1978); and even firemen entering privately owned premises to battle a fire, *see Michigan v. Tyler*, 436 U.S. 499, 506, 56 L.Ed.2d 486, 98 S.Ct. 1942 [1948] (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court*, *supra*, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 387 U.S., at 528, 18 L.Ed.2d 930, 87 S.Ct. 1727.

purposes of search or arrest. It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable."

Consistently with these long-recognized principles, the Court decided in *Payton v. New York*, *supra*, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. [Citations and footnotes omitted.]

Welsh v. Wisconsin, 466 U.S. 740, ——-——, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732, 742-43 (1984).

Welsh was an "exigent circumstances" not a "probable cause" case. Still, the court quoted *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-69, 92 L.Ed. 436 (1948), for the rule that forcible entry into homes may be made only with a search warrant:

> In *Johnson*, Justice Jackson eloquently explained the warrant requirement in the context of a home search:
>
> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime .... The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Welsh at —— n. 10, 104 S.Ct. at 2097 n. 10, 80 L.Ed.2d at 742 n. 10.

In *Thompson v. Louisiana*, — U.S. ——, ——, 105 S.Ct. 409, 410, 83 L.Ed.2d 246, 250 (1984), *reh'g denied*, — U.S. ——, 105 S.Ct. 961, 83 L.Ed.2d 965 (1985), the court reiterated the warrant requirement, and listed the exceptions to that requirement:

> In a long line of cases, this Court has stressed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 [514] (1967) (footnotes omitted). This was not a principle freshly coined for the occasion in *Katz*, but rather represented this Court's long-standing understanding of the relationship between the two clauses of the Fourth Amendment. See *Katz*, *supra* [389 U.S.], at 357 n. 19 and 19, 19 L.Ed.2d 576, 88 S.Ct. 507 [514 n. 19]. Since the time of *Katz*, this Court has recognized the existence of additional exceptions. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 69 L.Ed.2d 262, 101 S.Ct. 2534 (1981); *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976); *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976). However, we have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the "persons, houses, papers and effects" of the citizen. [Footnote omitted.]

In *New Jersey v. T.L.O.*, — U.S. ——, ——, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), the court also recognized a "school setting" exception to the fourth amendment's warrant requirement.

None of the exceptions listed in *Thompson* and *T.L.O.* suggest that the majority's exception for probationers exists. The Supreme Court refers to "a few specifically established and well delineated exceptions." *Thompson*, *supra*, — U.S. at ——, 105 S.Ct. at 410, 83 L.Ed.2d at 250. If exceptions must be specifically established and well delineated, a state court of appeals statement that the lack of a "probationer" exception need not deter it from creating one is difficult to accept. Given the Supreme Court's forceful language concerning exceptions to fourth amendment cases, I would leave it to that court to determine whether a "probationer" exception exists.

Even accepting the majority's conclusion that a warrantless search of a probationer's dwelling may be made with reasonable grounds to believe the dwelling contains contraband, those grounds do not exist in this case.

The facts surrounding the search are more extensive than the majority suggests. The probation officer testified that he could not recall which police officer told him of the existence or possible existence of defendant's gun, though he thought it was Officer Pitzner. Officer Pitzner did not recall telling the probation officer that defendant possessed a gun.

We cannot tell whether the unknown police officer told the probation officer that defendant had a gun or possibly had a gun—the probation officer testified to both. We cannot tell whether the unknown police officer's belief was founded on a hunch, informant information, rumor or imagination. Without knowing where information comes from, no one can form a conclusion, let alone a reasonable conclusion, that the information meets the "reasonable grounds to believe" standard adopted by the majority. In reality, the majority's standard is merely whether a possibility exists that a probationer possesses a gun. This amounts to license for police to break into any probationer's home at any time for any or no reason.

Probationers may achieve their status as a result of convictions for disorderly conduct, drunk driving, or fish and game law violations, as well as by being convicted of a major felony. Making all probationers' homes subject to forcible searches by the police for little if any reason results in the very evil the fourth amendment was designed to prevent. Probationers' guns and drugs are readily seized through the use of warrants or existing warrant exceptions. We do not need the one adopted by the majority.

126 Wis.2d 327

John MENDONCA, Dorothy H. Mendonca, Howard G. Heckner, and Peninsula Realty, Ltd., Petitioners-Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES, Respondent.

No. 84-2111.

Court of Appeals of Wisconsin.

Submitted on Briefs July 30, 1985.

Opinion Released Sept. 17, 1985.

Opinion Filed Sept. 17, 1985.

Landowners sought judicial review of designation by Department of Natural Resources of their property as wetland. The Circuit Court, Door County, Edwin C. Stephan, J., dismissed for lack of standing, and landowners appealed. The Court of Appeals, LaRocque, J., held that owners had standing.

Reversed.

1. Health and Environment ⇐25.19(4)

Property owners had standing to seek judicial review of Department of Natural Resource's adoption of final inventory wetland maps including owners' property as wetlands, notwithstanding that county had not yet fulfilled its statutory duty of placing designated areas in a shoreland-wetland zoning district. W.S.A. 227.15, 227.16.

administrative Code is superfluous. I don't see -- they're not legal authorities binding on this Court by any stretch of the imagination. There have been ample authorities that decided our way that also have not been reversed by the United States Supreme Court. Whether they're denied search in cases I don't see is really relevant. The point is there is no binding authori and the Court is stuck having to make the decision for itself with very little guidance from the Wisconsin Court 'cause they really haven't had much to say other than they haven't said, "You got no rights at all." And if this man has any rights to privacy, having those probation officers in the company of these police go rummagin, through his house on nothing more than a statement that he may have a gun there when you don't know how old the information is, where it came from, anything about that, that's just not enough.

THE COURT: Thank you. I think the language in State v. Tarrell in this regard is helpful, at least as far as this Court is concerned. And in State v. Tarrell, reported at 74 Wis. 2d 647, at page 652, the Supreme Court stated:

"The defendant Tarrell who was on probation as stated above was told by his probation agent to go to the police station to have his picture taken. He complied with this order but contends that this requirement -- this required appearance was an unconstitutional seizure of his body and that the

subsequent photographic seizure of his person was also unconstitutional in that they violated the fourth amendment of the United States Constitution."

And then the Court states as follows:

"The courts recognize that probationers do retain some fourth amendment rights. 'It is not the law that a person convicted of a previous offense loses his constitutional guaranties.' Concomitantly, this court has recognized that there are constitutional limitations on conditions of probation. The question is what is the extent of this protection.

"The fourth amendment requirement is that searches and seizures be reasonable. . . .

". . . This court has consistently adhered to the view that reasonableness is to be determined by the facts and circumstances presented in each case. . . . The fundamental rule applicable to searches and seizures is that warrantless searches are per se unreasonable under the fourth amendment except under certain circumstances." And then they cite an earlier Wisconsin case, and there it is stated:

"'Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--

subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'"'"

And at page 654:

"The ultimate standard set forth in the fourth amendment is reasonableness. One condition of probation requires the probationer to obey all laws of the State of Wisconsin. The agent has a duty to determine whether a probationer is complying with all probation conditions."

And then skipping down, "While there may not have been probable cause for the issuance of a warrant, there was probable cause for the agent's attempt to determine whether Tarrell had complied with the probation conditions. The application of a less stringent standard for the probation agent's search or seizure is appropriate because of the nature of probation. It coincides with the agent's dual role of assisting the probationer in his rehabilitation and protecting the public."

That case of Tarrell and that portion of Tarrell was cited in a later case, State v. Hanahan, 76 Wis.2d 387, a decision by the Wisconsin Supreme Court in 1977. And at page 395 the Court states:

"Having determined that a search took place, the

issue becomes whether the search was circumscribed by either the Fourth Amendment to the United States Constitution or Article I, section 11 of the Wisconsin Constitution. . . . The Fourth Amendment requires searches and seizures to be reasonable." And then citing State v. Tarrell. "'The fundamental rule applicable to searches and seizures is that warrantless searches are per se unreasonable under the Fourth Amendment except under certain well-defined circumstances.' There was no warrant to search Hills' house. If this warrantless search is to be found reasonable it must fall within one of the 'specifically established and well-delineated exceptions' to the warrant requirement."

In this case I think it is helpful to look at the citation that Mr. Hayes gave the Court on warrantless searches, the annotation at 32 ALR Fed. And the annotation begins at page 155. And at 160 the author of that annotation states as follows:

"Three general standards"-- and I think this succinctly puts the question -- "Three general standards of reasonableness have been applied to a parole officer's warrantless search of a parolee." Or in this case it's a probationer. "At one extreme there is the view that the Fourth Amendment standards are the same for parolees as for other citizens. The court taking this view seems to consider the Fourth Amendment reasonableness standards

to be inflexible holding that since the parolee did not lose his Fourth Amendment rights he has the same rights as any other person, whereas the other courts take the view that what is reasonable in one situation might not be reasonable in another situation.

"At the other end of the scale, there is the view that a parole officer's warrantless search of a parolee or his premises is a reasonable search under the Fourth Amendment even though the parole officer has neither probable nor reasonable cause to believe that the parolee has violated the terms of his parole. The primary basis for this view is that the parolee remains in custodia legis. Between these two positions is the view that these warrantless searches are valid only if the parole officer possesses a 'reasonable cause' to believe the parolee is violating or is about to violate the terms of his parole. Reasonable cause is said to require less evidence than probable cause, but requires some objective evidence sufficient to at least stimulate the parole officer's suspicion. A parole officer's search simply on impulse, or a routine search to keep the parolee honest, would seem to be unreasonable under this view."

And it seems to me that that is what our Court was saying in the case of State v. Tarrell, and that decision is by Chief Justice Beilfuss. And he has said in that case that probationers do

retain Fourth Amendment rights, and the question is to the extent of the protection. And, "This court has consistently adhered to the view that reasonableness is to be determined by the facts and circumstances presented in each case."

Number one, I do not find that this was, in fact, a police search. This information was furnished to the probation agent. The agent was told by a Beloit police detective that they believed that there were guns in the probationer's apartment, or maybe there were guns in the probationer's apartment. But it didn't come as an anonymous tip, and it didn't come from an average citizen. And, as a matter of fact, the tip didn't come from an ordinary patrolman. It came from a detective on the Beloit Police Department.

And after that information was reported, the supervisor of the Division or Department of Probation and Parole apparently after considering this matter determined that he would make a search of the defendant's home. And then he called the police department and requested officers to accompany him and the agent who was going to go with him in making that search for protection.

And as I recall, the evidence, i. was specifically indicated that the purpose of the officers going with the probation and parole officer was for the purpose of protection. And as a matter of fact, the acts of the officers at the premises would bear out those statements in that the testimony shows that Mr. Law, one of the probation officers, went and searched one room,

Johnson went -- another probation officer searched another room while the Beloit police officers remained in the living room with the defendant and with the woman who was living there.

And then it was after the search had been made of the two rooms off the living room by the probation officers that Mr. Law then came back into the living room, and Mr. Law apparently in plain sight viewed the marijuana that was sitting on a table, and in a drawer which was broken and because it was broken once you got within several feet of the table you could view a gun that was in this drawer in the table.

True enough apparently the officer did point in the general direction of the table. But, nevertheless, I find based upon a reasonable interpretation of the evidence that the purpose of the officers in going to the residence of Mr. Griffin was for the protection of the probation and parole officers in making their search and was specifically at the request for that purpose.

The question then gets down to whether or not the probation officer in making his search acted reasonably. And based upon the evidence before the Court, I find that he did act reasonably. The probation and parole officer was furnished information by a detective of the Beloit Police Department, that they believed that there were guns or maybe there were guns in this probationer's apartment, his residence. And the probation and parole officer has an obligation to determine whether or not his person on probation is violating the laws of the State of Wisconsin or

violating any of the conditions and rules of probation. And I believe that he has acted reasonably in making this search and that, therefore, this is not a violation of the condition or of the Fourth Amendment privileges of the defendant.

I would say that I have read carefully the decisions set forth in the annotation 32 ALR Fed 155, those decisions being the decisions under the heading Parole Officer Acting on Tip from Police. And those cases in which the search was held to be reasonable are cases reported Santos v. New York, a 1971 case; People v. Hernandez, a 1964 case; and People v. Quilon, a 1966 case; People v. Limon, a 1967 case; People v. Thomas, a 1975 case; Himmage v. State, a 1972 case; and People v. Santos again, a 1969 case; People v. Adams, a 1971 case; People v. Adams, a 1970 case; and then in the pocket part there are more recent cases, United States v. Gordon -- well, first, State v. Morgan, 1980 case from Nebraska; and then a ninth circuit case, United States v. Gordon; and then Roman v. Alaska -- Roman v. State, which is an Alaska case; and then finally Gonzales v. the State, another Alaska case.

And based upon the reasoning that I have stated and the citations of authority, the motion to suppress -- strike that -- the motion to dismiss because of an illegal arrest and the motion to suppress the evidence are each denied.

Now, the next motion is the motion to dismiss the habitual criminality allegation. And, Mr. Rabermehl, I will hear you concerning that.

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

1986 TERM

IN THE
UNITED STATES SUPREME COURT

Case No. 86-5324

JOSEPH G. GRIFFIN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

1986 Term

IN THE
UNITED STATES SUPREME COURT

Case No. 86-5124

JOSEPH G. GRIFFIN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Wisconsin, respondent, opposes the petition for a writ of certiorari filed by petitioner Joseph G. Griffin. The Wisconsin Supreme Court fully considered and correctly decided the issues that petitioner raises.

ADDITIONAL FACTS RELEVANT TO
THE STATEMENT OF THE CASE

Searches of probationers are governed by administrative rules promulgated by the Wisconsin Department of Health and Social Services. The relevant rules, including the published explanatory comments, are reproduced for the court's convenience as Respondent's Appendix 101-07. Although petitioner was on probation for various misdemeanor offenses at the time of the warrantless search conducted by his probation officer, he had previously been convicted of a felony. Possession of a firearm by a convicted felon is itself a felony. Sec. 941.29(2), Wis. Stats. When probation begins, every probationer is informed that he must make himself and his residence available for searches of his residences conducted by field staff when there are reasonable grounds to believe that contraband may be found there. Section HSS 328.04(3)(k), Wis. Adm. Code (1986). A firearm in the possession of a convicted felon is contraband. Section HSS 328.16(1)(b), Wis. Adm. Code (1986). The petitioner has completed his sentence for the offenses that are the subject of this case.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE WISCONSIN SUPREME COURT REFLECTS THE MAJORITY POSITION ON THE ISSUE OF WARRANTLESS SEARCHES OF A PROBATIONER'S RESIDENCE BY A PROBATION OFFICER, DOES NOT CONFLICT WITH ANY ESTABLISHED PRINCIPLES OF FOURTH AMENDMENT LAW, AND DOES NOT REQUIRE REVIEW BY THIS COURT.

Petitioner suggests that there is a sharp split of authority on the issue he brings to this court. There is a "split" but the overwhelming majority position is that reflected by the decision of the Wisconsin Supreme Court.

Professor LaFave, in his treatise on the fourth amendment, considers this topic at § 10.10, "Searches Directed at Parolees and Probationers." 3 W. LaFave, Search and Seizure § 10.10 (1978). He summarizes: "[T]here is considerable authority supporting the proposition that probationers may lawfully be subjected to searches which, absent their probation status, would be deemed unlawful because of the absence of probable cause or a search warrant or both." 3 W. LaFave, Search and Seizure § 10.10, at 422. LaFave concludes that parolees and probationers "'have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities "reasonable" which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate government demands.'" 3 W. LaFave, Search and Seizure § 10.10, at 431, quoting People v. Mason, 5 Cal. 3d 759, 97 Cal. Rptr. 302,

486 P.2d 630 (1971). See also State v. Earnest, 293 N.W.2d 365 (Minn. 1980); State v. Pinson, 104 Idaho 227, 657 P.2d 1095 (Ct. App. 1983); State v. Velasquez, 672 P.2d 1254 (Utah 1983); Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir. 1975).

The cases cited by petitioner in support of his claim that a warrant and probable cause are requirements for a search of a probationer's residence reflect what is regarded as the minority view on this issue. See 1 Ringel, William E., Searches & Seizures, Arrests and Confessions, § 17.3 (2nd ed. 1986). The majority view is typified by the ninth circuit's decision in Latta.

Latta held that a parole officer's warrantless search of a parolee's residence did not violate the fourth amendment and that evidence seized could be used in a criminal prosecution, as well as in the revocation proceeding.

Although Latta involved the search of a parolee's residence as opposed to that of a probationer, courts and commentators generally agree that for purposes of the fourth amendment, there is no distinction. Earnest, 293 N.W.2d at 368 n.2; Pinson, 657 P.2d at 1099; Roman v. State, 570 P.2d 1235, 1237 n.3 (Alaska 1977); Velasquez, 672 P.2d at 1258; State v. Simms, 10 Wash. App. 75, 516 P.2d 1088, 1091 (1973); 3 W. LaFave, Search and Seizure § 10.10. See also Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

The Latta court noted that unless parole agents are able to make warrantless searches, it would be otherwise impossible to find out if the parolee is using drugs or is keeping weapons in his home. Latta, 521 F.2d at 250. After all, these are not the kinds of items that a parolee or probationer is likely to admit to his supervising officer that he has in his possession. Yet, their possession is

completely contrary to the dual purposes of probation, rehabilitation and protection of the public.

Other cases upholding warrantless searches of a probationer's or parolee's residence include State v. Gallagher, 100 N.M. 697, 675 P.2d 429 (Ct. App. 1984); State v. Perbix, 331 N.W.2d 14 (N.D. 1983); Simms; Earnest; Himmage v. State, 88 Nev. 296, 496 P.2d 763 (1972); Mason; Velasquez; State v. Morgan, 206 Neb. 818, 295 N.W.2d 285 (1980).

Over a decade ago, Wisconsin recognized an exception to the warrant requirement when a search is directed at probationers:

> If there is to be an exception to the requirements of the fourth amendment granting probation agents a limited right to search or seize a probationer without a warrant, the foundation for this exception lies in the nature of probation itself. Probation, like parole, "is an integral part of the criminal justice system and has as its object the rehabilitation of those convicted of crime and the protection of the state and community interest." State ex rel. Niederer v. Cady, 72 Wis. 2d 311, 322, 240 N.W.2d 626, 633 (1976). While probation is a privilege, not a matter of right, once it has been granted this conditional liberty can be forfeited only by breaching the conditions of probation. A sentencing judge may impose conditions which appear to be reasonable and appropriate. Sec. 973.09, Stats. A sentence of probation places the probationer "in the custody of the department" subject to the conditions of probation and rules and regulations of the Department of Health & Social Services. Sec. 973.10. All conditions, rules and regulations must be imposed with the dual goal of rehabilitation of the probationer and protection of the public interest. The imposition of these conditions, rules and regulations demonstrates that while a probationer has a conditional liberty, this liberty is neither as broad nor as free from limitations as that of persons who have not committed a crime. The expectations of privacy of a person on probation cannot be the same as the expectations of privacy of persons not on probation. It is only the reasonable expectations of privacy which the fourth amendment protects. Conditions of probation must at times limit the constitutional freedoms of the probationer. Necessary infringements on these freedoms are permissible as long as they are not overly broad and are reasonably related to the person's rehabilitation. By the very nature of probation, limitations on the liberty and privacy of

> probationers are imposed. These limitations are the bases for an exception to the warrant requirement of the fourth amendment.

State v. Tarrell, 74 Wis. 2d 647, 653-54, 247 N.W.2d 696 (1976) (footnotes omitted).

Two recent decisions of this Court show that the decision of the Wisconsin Supreme Court is not in conflict with accepted fourth amendment principles.

In Hudson v. Palmer, 468 U.S. 517 (1984), this Court held that the fourth amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The Court had to balance two interests, the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. Hudson, 468 U.S. at 527. The balance had to tip in favor of the first interest: "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." Hudson, 468 U.S. at 527-28.

This Court considered the nature of the status of the prisoner:

> Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson, 468 U.S. at 526.

This Court then cited statistics of prison violence to illustrate the magnitude of the problem that justified the balancing of interests against recognition of any fourth amendment right in the privacy of the prison cell. Then the Court examined the need for surveillance and supervision:

> Within this volatile "community," prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors. They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize. In addition to these monumental tasks, it is incumbent upon these officials at the same time to maintain as sanitary an environment for the inmates as feasible, given the difficulties of the circumstances.
>
> The administration of a prison, we have said, is "at best an extraordinarily difficult undertaking." . . . But it would be literally impossible to accomplish the prison objectives identified above if inmates retained a right of privacy in their cells. Virtually the only place inmates can conceal weapons, drugs, and other contraband is in their cells. Unfettered access to these cells by prison officials, thus, is imperative if drugs and contraband are to be ferreted out and sanitary surroundings are to be maintained.

Hudson, 468 U.S. at 526-27 (citations omitted).

Although the probationer is not a prisoner in a cell, he shares many of the attributes of the incarcerated prisoner. And although he is not in the absolute physical custody of the state, in Wisconsin he is in the legal custody of the state:

> Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers and parolees.

Sec. 973.10(1), Wis. Stats.

Like incarcerated prisoners, probationers have "demonstrated proclivity for antisocial criminal, and often violent, conduct." Hudson, 468 U.S. at 526. Like incarcerated prisoners, probationers have "shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of

self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others." Hudson, 468 U.S. at 526.

The second case is New Jersey v. T.L.O., 105 S. Ct. 733 (1985), in which this Court considered a warrantless search of a high school student by an assistant vice principal on less than probable cause. High school students are not prisoners in cells and, of course, the fourth amendment applies to searches conducted by school officials. That truism, said the Court, was only the beginning of the inquiry:

> To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, supra, 387 U.S., at 536-537, 87 S.Ct., at 1735. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

New Jersey v. T.L.O., 105 S. Ct. at 741.

This Court reaffirmed the obvious difference between the schoolchild and the prisoner, a difference marked by "'the harsh facts of criminal conviction and incarceration.'" New Jersey v. T.L.O., 105 S. Ct. at 742, citing Ingraham v. Wright, 430 U.S. 651, 669 (1977). Still, this Court recognized the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds, not for its own sake, but so that the purpose of the schools, education, could take place. New Jersey v. T.L.O., 105 S. Ct. at 742. Close supervision of schoolchildren is essential to that task.

In striking "the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place," the Court reasoned that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." New Jersey v. T.L.O., 105 S. Ct. at 743. The result was (1) that the warrant requirement was found to be "unsuited to the school environment" and (2) that the level of suspicion needed to justify a search in that environment was held to be less than probable cause. New Jersey v. T.L.O., 105 S. Ct. at 743.

Why should society require either a warrant or probable cause for the search of the probationer's residence when it requires neither for the search of the presumptively innocent schoolchild? Common sense requires that this Court place the search of the probationer's residence somewhere between the search of the prison cell and that of the schoolchild. "Our laws relating to probation must have a reasonable, common-sense interpretation." State ex rel. Vanderhei v. Murphy, 246 Wis. 168, 171, 16 N.W.2d 413 (1944).

Traditional principles of fourth amendment law, framed in terms of a "legitimate expectation of privacy," also show that petitioner's claim, at least as applied to the Wisconsin system of probation, cannot possibly prevail. It is difficult to comprehend how a probationer, having been informed that as a condition of his probation he must submit to warrantless searches of his residence in accordance with the department's rules, can claim that he expected no such search. He may not like the idea of a search that uncovers a firearm but he cannot realistically say that it was unexpected.

Petitioner suggests to this Court that the decision of the Wisconsin Supreme Court is in error because it approved the warrantless search of his residence on less than probable cause. Ordinarily a search, even one that may permissibly be carried out without a warrant, must be based on "probable cause" to believe that a violation of the law has occurred. New Jersey v. T.L.O., 105 S. Ct. at 743. However, "probable cause" is not an irreducible requirement of a valid search. Id.

Although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search or seizure, in certain circumstances the courts have required neither. New Jersey v. T.L.O., 105 S. Ct. at 743.

> Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

New Jersey v. T.L.O., 105 S. Ct. at 743.

The very nature of probation ("discipline under supervision without incarceration," Phillips v. United States, 212 F.2d 327, 334 (9th Cir. 1954)) demonstrates the correctness of the decision of the Wisconsin Supreme Court. Any other decision would cripple the functioning of the program, put the public at great risk, and diminish the effectiveness of the rehabilitative goals of the program.

CONCLUSION

If this Court wants to address the question of probations and the fourth amendment, it should do so in another case. If, as petitioner asserts, the authorities are split, the Court should have no trouble finding a decision invalidating a warrantless search of a

probationer's residence. The decision of the Wisconsin Supreme Court is not broken; it needs no fixing.

Respectfully submitted,

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October 31, 1984

RESPONDENT'S APPENDIX

STATUTORY PROVISIONS

973.10 Control and supervision of probationers. (1) Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers and parolees.

ADMINISTRATIVE CODE PROVISIONS (RULES)

Chapter HSS 328

ADULT FIELD SUPERVISION

HSS 328.01 Purpose. The purposes of this chapter are to provide rules for community and facility-based supervision, services, and programs for clients under control in order to assure public safety, promote social reintegration, reduce repetition of crime and carry out the statutory directives under s. 46.001, Stats.

HSS 328.04 Field supervision. (1) Parole and probation supervision is a mechanism of control and an attempt to guide offenders into socially appropriate ways of living. Field staff are to provide individualized supervision of clients in a manner consistent with the goals and objectives of this chapter. Specifically, field staff are to attempt to help the client be successfully reassimilated into the community, help the client adjust to and cope with community living, reduce crime, and protect the public.

(2) An agent shall abide by the department's administrative rules. An agent's responsibilities upon receiving a client for control and supervision shall include:

. . . .

(k) Monitoring the client's compliance with the conditions and rules of supervision to insure appropriate control of the client and the protection of the public;

. . . .

(w) Reporting all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority; and

. . . .

(3) When probation or parole begins, an agent shall meet with a client to review or develop written rules and specific conditions of the client's supervision, or both. These rules require that the client shall:

. . . .

(j) Obtain advance permission from an agent to purchase, possess, own or carry a firearm or other weapon. An agent may not grant a client permission to possess a firearm if the client is prohibited from possessing a firearm under s. 941.29, State., or federal law.

(k) Make himself or herself available for searches or tests ordered by the agent including but not limited to urinalysis, breathalizer, and blood samples or search of residence or any property under his or her control;

. . . .

HSS 328.16 Contraband. (1) In this chapter, "contraband" means:

(a) Any item which the client may not possess under the rules or conditions of the client's supervision; or

(b) Any item whose possession is forbidden by law.

(2) Any field staff member who reasonably believes that an item is

contraband may seize the item, whether or not the staff member believes a violation of the client's rules or conditions of supervision has occurred.

. . . .

HSS 328.21 Search and seizure. (1) A search of a client, client's living quarters, or property may be made at any time, but only in accordance with this section.

. . . .

(4) A search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances require search without approval.

. . .

(5) Field staff shall strive to preserve the dignity of clients in all searches conducted under this section.

(6) Whenever feasible, before a search is conducted under this section, the client shall be informed that a search is about to occur, the nature of the search, and the place where the search is to occur.

(7) In deciding whether there are reasonable grounds to believe a client possesses contraband, or a client's living quarters or property contain contraband, a staff member should consider:

(a) The observations of a staff member;

(b) Information provided by an informant;

(c) The reliability of the information relied on; in evaluating reliability, attention should be given to whether the information is detailed and

consistent and whether it is corroborated;

(d) The reliability of an informant; in evaluating reliability, attention should be given to whether the informant has supplied reliable information in the past, and whether the informant has reason to supply inaccurate information;

(e) The activity of the client that relates to whether the client might possess contraband;

(f) Information provided by the client which is relevant to whether the client possesses contraband;

(g) The experience of a staff member with that client or in a similar circumstance;

(h) Prior seizures of contraband from the client; and

(i) The need to verify compliance with rules of supervision and state and federal law.

APPENDIX [TO HSS 328]

Note: HSS 328.21. This section provides for searches of clients, clients' living quarters and property by field staff. Although it is preferable to have searches and seizure conducted by law enforcement authorities, that may not always be feasible or advisable, and it is deemed important to give field staff the authority to conduct reasonable searches at reasonable times. Experience teaches that these searches may be necessary because contraband, including drugs and weapons, may be discovered during these searches. These searches are thought to deter the possession of contraband.

Contraband, particularly weapons, may be used to threaten, injure, or kill another. That weapons be kept out of the hands of clients is critical for

the safety of others. Contraband must also be kept out of the hands of clients so they may be better able to participate in jobs, schooling or training, and other programs effectively.

While the discovery of contraband is important, this is not to say that the authority to search should be without control. Consideration should be given to the possible effects of a search on a client's rehabilitation, or family and peer relationships. Rehabilitation as well as the control of a client is the responsibility of field staff and searches should be conducted so as not to unreasonably upset delicate personal relationships. This section attempts to give due regard to client concerns about their privacy.

The Wisconsin Supreme Court in State v. Tarrell, 74 Wis. 2d 647 (1976), discussed the fourth amendment rights of adult probationers. The court at 652-54 stated:

[excerpt from Tarrell]

The application of a less stringent standard for the agent's search or seizure is appropriate, therefore, because of the nature of field supervision.

. . . .

Subsection (4) (e) indicates the conditions for a search when the client is not present. The agent may enter in any way that does not do damage to the property. Subsection (4) requires supervisor approval unless the search is conducted in exigent circumstances. Examples of exigent circumstances are where drugs or other contraband would be destroyed if the premises were not searched; or if it were feared that the parolee had a gun and might use it; an immediate search would be necessary to seize it before that could occur.

Subsection (5) states the policy that the dignity of clients should be preserved when searches are conducted. Searches are unpleasant for everyone involved. Recognition of this and attempts to preserve dignity may have a humanizing influence on the process.

Subsection (6) also regulates the manner of conducting searches. It requires that the client be informed that a search is about to occur, its nature, and the place it is to be made unless it is a random search. By informing the client orally, the staff member may enlist the client's cooperation and make the search easier on all concerned.

Of course, it is not possible to give advance notice of a random search. This would defeat its purpose. However, it is important that clients who are likely to be searched pursuant to sub. (2) (c) and (2) (b) 3 be aware that such searches may be conducted.

Subsection (7) indicates what should be considered in determining if there are reasonable grounds for a search. Errors and abuse of search authority may be due to inadvertence and poor judgment. This section seeks to avoid abuses and errors.

Often, very general information is not reliable because its lack of detail suggests it is hypothetical or incomplete. Specificity on the other hand, usually suggests a more reliable grasp of the the relevant facts. Consistency of information is also important. If a report is internally inconsistent, this makes it less reliable. Subsection (7) (c) requires attention to the specificity and consistency of information. Of course, specificity or the lack of it is helpful in evaluating information.

Subsection (7) (d) requires attention to the reliability of the infor-

mant, if one exists. Has the person supplied accurate information in the past? Does he or she have a reason to mislead? These are helpful questions to ask in evaluating an informant's reliability.

Subsection (7) (e) suggests that attention must be paid to the activity of any client who may be involved with the subject of the search. If a client acts in a way that is consistent with the possession of contraband by another client, this bears on the decision whether to search the client suspected of possessing contraband.

Subsection (7) (f) indicates that the client should be talked to before the search. Sometimes, this will elicit information helpful in determining whether a search should be made.

What a staff member observed, information from a reliable source, prior seizures of evidence from the client, and the experience of the staff member are all also relevant to the determination to be made by the supervisor.

This section is in substantial compliance with ACA, standard 3151. See 15 Cal. Adm. Code 2511 that provides for warrantless searches of a client, a client's residence or property, at any time, without a finding of reasonable grounds to believe that the client possesses contraband, as a condition of parole.

JOINT

APPENDIX

No. 86-5324

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH G. GRIFFIN, PETITIONER

v.

STATE OF WISCONSIN, RESPONDENT

On Writ of Certiorari to the Supreme Court of Wisconsin

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 19, 1986
CERTIORARI GRANTED DECEMBER 8, 1986

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES IN COURTS BELOW

DATE	PROCEEDINGS
September 4, 1980	—Petitioner convicted of three misdemeanors and and placed on probation.
April 5, 1983	—Petitioner's residence searched by probation officers and police officers, and a firearm is found therein.
April 11, 1983	—Criminal complaint filed charging petitioner with possession of a firearm by a felon.
April 28, 1983	—Petitioner waives preliminary hearing and is bound over for trial.
May 3, 1983	—Information filed charging petitioner with possession of a firearm by a felon.
May 16, 1983	—Arraignment, at which not guilty plea is entered on behalf of petitioner.
June 3, 1983	—Motion to Suppress seeking exclusion of results of the search filed on behalf of petitioner.
July 15, 1983	—Hearing on Motion to Suppress.
August 15, 1983	—Oral argument on Motion to Suppress, following which Motion to Suppress is denied.
August 18, 1983	—Jury trial, at end of which petitioner is convicted of offense of possession of a firearm by a felon.
September 2, 1983	—Written Order denying petitioner's Motion to Suppress filed.
September 16, 1983	—Petitioner sentenced.
October 24, 1983	—Judgment of Conviction and Sentence amended to reflect credit for time served.

DATE	PROCEEDINGS
January 5, 1984	—Notice of Appeal filed in Wisconsin Court of Appeals.
September 12, 1985	—Decision of Wisconsin Court of Appeals filed, affirming petitioner's conviction.
October 14, 1985	—Petition for Review of Wisconsin Court of Appeals decision filed in Wisconsin Supreme Court.
December 11, 1985	—Petition for Review granted by Wisconsin Supreme Court.
June 20, 1986	—Decision of Wisconsin Supreme Court filed, affirming petitioner's conviction.
July 23, 1986	—Remittitur of Wisconsin Supreme Court.

SUPPLEMENTARY INCIDENT REPORT

[R. 16: 2-3]

1. Offense/Incident Possession of Firearm

   Address of Occurrence 1021½ Central

   Incident Number 6-83-09908

2. Victim's Name (Last, First, Mid.) Firm Name if Business

3. Special Routing Request District Attorney & State Probation & Parole

On April 5, 1983 at 1600 hours myself, Detective Hanson and Detective Lathrop went to 1021½ Central the residence of Joseph G. Griffin. We went here at the request of his Probation Officer, Mike Lew. Mr. Lew explained the reason he was going here was to make a search of Joseph Griffin's residence. Our presence was requested while the search was being made by Mike Lew and Joanne Johnson of the State Probation Office. This was for security purposes and not to search which was maintained.

As a result of the search a quantity of marijuana was found and miscellaneous drug paraphanelia. Also found was a firearm. This was in open view in the living room area. Upon observing the weapon Mike Lew confiscated it. For security purposes he turned the weapon over to me. This weapon was found to be a Colt, 2 inch, .357 Magnum, Lawman III revolver, serial #J59923, nickel blue in color. The weapon was assigned property tag #51238 and a copy of which was given to Mike Lew as a receipt.

In regards to Joseph G. Griffin, DOB: 9/7/54 of 1021½ Central, it is requested that he be charged with possession of a firearm as a felon, reference State Statutes 941.29. Copies of this subject's previous record are attached. All of this information is then requested to be

referred to the District Attorney's Office for final determination on the charge.

On April 5, 1983 at 1600 hours, myself, Detective Hanson and Lathrop went to 1021½ Central. The residence of Joseph G. Griffin. We went here at the request of his Probation Officer, Mike Lew. Mr. Lew explained the reason he was going here was to make a search of Joseph Griffin's residence. Our presence was requested while the search was being made by Mike Lew and Joanne Johnson of the State Parole & Probation Office. Our presence was for security purposes and not to search which was maintained.

As a result of the search there was a portion of marijuana found in the living room in open view on the table. The portion of marijuana was approximately ½ cup full, it filled the bottom part of a plastic type baggie. Mike Lew took possession of this substance. Myself and the other Detectives also observed this as it was in plain view. Also confiscated by Mike Lew and Joanne Johnson as a result of this search was miscellaneous drug paraphanalia. In addition to these items found there was also a firearm found. This was also confiscated.

As a result of the above we request that Joseph G. Griffin, n/m. DOB: 9/7/54 of 1021½ Central be charged with possession of marijuana. We request that this information be forwarded to the D.A.'s Office for review and a determination be made as to the appropriate charge.

Officer Det. Leppla

Officer No. 55

Date 4/6/83

[R. 16: 9-10]

On 04-05-83, Probation and Parole agent Joanne Johnson and supervisor Michael Lew conducted a probation officer's search. Myself, Det. Leppla, and Det. Hanson, stood by while the search was being conducted. Upon our arrival at the apartment we noticed a clear plastic bag containing a green leafy substance that appeared to be marijuana, on a table in plain view, in the living room area. Also in this living room area, there was a dresse with a television sitting on top of it. The dresser had a drawer that was left open approx. 6-8". Also in plain view inside this drawer, was the firearm that was taken into property, see Det. Leppla's report. The marijuana and firearm were collected as evidence.

Upon leaving the Griffin Apartment, Mike Lew and Joanne Johnson kept the baggy of marijuana in their possession. They intended to, through the probation and parole department, request the state crime lab to run a test on the suspected marijuana for the revocation hearing on Griffin.

On 04-06-83 I received a call from the D.A.'s office. They requested that a sample of the marijuana that was seized be given a field test. This was for the purpose of their criminal complaint against Joe Griffin. At 0830 on 04-07-83 I responded to the probation and parole office. Upon arrival I met with supervisor Michael Lew who did supply a small quantity of the suspected marijuana. Mr. Lew did confirm the fact that this same sample of marijuana was taken from the quantity of marijuana that was taken from the Griffin apartment.

I responded back to the police department where the Duquenois-Levine field test was conducted on the suspected marijuana. The duquenois-Levine test showed a positive result for the presence of marijuana.

This information was immediately forwarded to the D.A.'s office for their information.

Officer Det. Lathrop 040783

Officer No. 85

STATE OF WISCONSIN
COUNTY OF ROCK
CIRCUIT COURT, BRANCH IV

Case No. ————

THE STATE OF WISCONSIN, PLAINTIFF

—vs—

JOSEPH G. GRIFFIN, D.O.B. 9/7/54, DEFENDANT

CRIMINAL COMPLAINT

Patrick O'Neill being first duly sworn, on oath says (that he is informed and verily believes) that on or about the 5 day of April, 1983, at the City of Beloit in said County the defendant JOSEPH G. GRIFFIN did intentionally and feloniously as a person who has been convicted of a felony in this state, to-wit: possession of heroin with intent to deliver, contrary to Section 161.41(1m)(a) of the Wisconsin Statutes, did subsequently to that conviction possess a firearm, to-wit: a Colt .357 Magnum Lawman III, contrary to Section 941.29(2) of the Wisconsin Statutes and subject to a penalty of a fine of not more than $10,000 or imprisonment for not more than 2 years or both; and

HABITUAL CRIMINALITY ALLEGATION

That on or about the 5th day of April, 1983, at the City of Beloit, in said County, the defendant, JOSEPH G. GRIFFIN, did commit the crime of possession of a firearm as a felon for which the maximum term of imprisonnment is more than one year but not more than ten years and that said term of imprisonment may be in-

creased by not more than two years because the defendant has been convicted of three misdemeanors within the last five years, as provided by Wi. Stat. Sec. 939.62(1)(b), to-wit: resisting arrest, disorderly conduct and obstructing, all on September 4, 1980 in Rock County Circuit Court Branch IV, Beloit, Wisconsin; and

COUNT TWO

That on or about the 5th day of April, 1983, at the City of Beloit, in said County, the defendant, JOSEPH G. GRIFFIN, did unlawfully have in his possession a controlled substance as defined in Wis. Stat. 161.14(4)(t), to-wit: tetrahydrocannabinol (THC), contrary to Section 161.41(3) of the Wisconsin Statutes and subject to a penalty of a fine of not more than $500.00 or imprisonment for not more than 30 days in the county jail or both; and

HABITUAL CRIMINALITY ALLEGATION

That on or about the 5th day of April, 1983, at the City of Beloit, in said County, the defendant, JOSEPH G. GRIFFIN, did commit the crime of possession of tetrahydrocannabinol (THC) for which the maximum term or imprisonment is one year or less and that said term of imprisonment may be increased to not more than three years because the defendant has been convicted of three misdemeanors within the last five years, as provided by Wis. Stat. Sec. 939.62(1)(a), to-wit: resisting arrest, disorderly conduct and obstructing, all on September 4, 1980 in Rock County Circuit Court Branch IV, Beloit, Wisconsin and all against the peace and dignity of the State of Wisconsin and prays that the defendant be arrested and dealt with pursuant to and according to law.

That the basis for affiant's allegation is that he is the Court Officer for the City of Beloit Police Department

and as such has read the report of Officers Leppla and Lathrop of that department which states:

Detective Leppla reports that he spoke with a subject who identified himself as Mike Lew and Mike Lew is the head agent for the Beloit Office of the Wisconsin Probation and Parole Division and Mike Lew informed him that on April 5, 1983 he went to 1021½ Central, in the City of Beloit, Rock County, Wisconsin, and that that is the residence of Joseph G. Griffin and that he entered that residence and in plain view he observed a handgun and he did find a quantity of green-brown leafy substance. Detective Leppla further reports that Mike Lew did give to him said green-brown leafy substance and said handgun which was a .357 Magnum, Lawman III revolver, having serial #J59923.

Detective Lathrop reports that he tested the above mentioned green-brown leafy substance and said substance was tested by the use of the Duquenois-Levine test and said test showed positive for the presence of THC.

Your affiant further states that he has reviewed the records of Rock County Circuit Court Branch IV and those records reveal that Joseph G. Griffin has previously been convicted of possession of heroin with intent to deliver and burglary, both felonies in the State of Wisconsin.

/s/ Patrick O'Neill
Complainant

[Affidavit Omitted in Printing]

STATE OF WISCONSIN
COUNTY OF ROCK CIRCUIT COURT BR. IV

THE STATE OF WISCONSIN

vs.

JOSEPH G. GRIFFIN, DEFENDANT

INFORMATION

I, William J. Hayes, Assistant, District Attorney for Rock County, Wisconsin, do hereby inform the Court that on or about the 5 day of April, 1983, at the City of Beloit, in said County of Rock and State of Wisconsin, the defendant, JOSEPH G. GRIFFIN, did intentionally and feloniously as a person who has been convicted of a felony in this state, to-wit: possession of heroin with intent to deliver, contrary to Sec. 161.41(1m)(a) of the Wisconsin Statutes, did subsequently to that conviction possess a firearm, to-wit: a Colt .357 Magnum Lawman III, contrary to Section 941.29(2) of the Wisconsin Statutes; and

HABITUAL CRIMINALITY ALLEGATION

That on or about the 5th day of April, 1983, at the City of Beloit, in said County, the defendant, JOSEPH G. GRIFFIN, did commit the crime of possession of a firearm as a felony for which the maximum term of imprisonment is more than one year but not more than ten years and that said term of imprisonment may be increased by not more than two years because the defendant has been convicted of three misdemeanors within the last five years, as provided by Wis. Stat. Sec. 939.62 (1)(b), to-wit: resisting arrest, disorderly conduct and

obstructing, all on September 4, 1980 in Rock County Circuit Court Branch IV, Beloit, Wisconsin; and

COUNT TWO

That on or about the 5th day of April, 1983, at the City of Beloit, in said County, the defendant, JOSEPH G. GRIFFIN, did unlawfully have in his possession a controlled substance as defined in Wis. Stat. 161.14(4)(t), to-wit: tetrahydrocannabinol (THC) contrary to Section 161.41(3) of the Wisconsin Statutes; and

HABITUAL CRIMINALITY ALLEGATION

That on or about the 5th day of April, 1983, at the City of Beloit, in said County, the defendant, JOSEPH G. GRIFFIN, did commit the crime of possession of tetrahydrocannabinol (THC) for which the maximum term of imprisonment is one year or less and that said term of imprisonment may be increased to not more than three years because the defendant has been convicted of three misdemeanors within the last five years, as provided by Wis. Stat. Sec. 939.62(1)(a), to-wit: resisting arrest, disorderly conduct and obstructing, all on September 4, 1980 in Rock County Circuit Court Branch IV, Beloit, Wisconsin, and all against the peace and dignity of the State of Wisconsin.

Dated May 2, 1983.

/s/ William J. Hayes
Assistant District Attorney
for Rock County, Wisconsin

STATE OF WISCONSIN
CIRCUIT COURT
ROCK COUNTY

Case No. 83 CR 1442

STATE OF WISCONSIN, PLAINTIFF

vs.

JOSEPH G. GRIFFIN, DEFENDANT

MOTION TO SUPPRESS

JOSEPH G. GRIFFIN, defendant above named, appearing specially, by his attorneys, KALAL & HABERMEHL, respectfully moves the Court for the entry of an Order suppressing for use as evidence at the trial in this action all evidence obtained directly or indirectly by the exploitation, as the result, or as fruit of the search of defendant's residence located at 1021½ Central Avenue, City of Beloit, Rock County, State of Wisconsin, on or about April 5, 1983, including, without limitation, a Colt .357 Magnum Lawman III revolver, serial #J59923, and any controlled substance, including tetrahydrocannabinal (THC), upon the grounds that said search of defendant's residence, and said seizure of said evidence, were acts performed by police officers, or by persons acting as agents of and in consort with police officers, were not performed pursuant to a lawfully authorized warrant, were not based upon probable cause, and were not based upon any exception to the requirement that a warrant be obtained; and on the further grounds that, to the extent said search, and said seizure of said evidence, were performed by employees of the State of Wisconsin,

Department of Health and Social Services, Division of Corrections, in their supervisory capacity over defendant as a probationer, said search and said seizure of said evidence were illegal, in that they were not performed pursuant to a valid warrant, were not performed pursuant to any exception to the requirement that a warrant be obtained, and were not based upon probable cause, or reasonable belief or suspicion, and were unreasonable under the circumstances; all in violation of defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article One, Sections One and Eleven of the Wisconsin Constitution.

Dated at Madison, Wisconsin, May 27, 1983.

Respectfully submitted,

JOSEPH G. GRIFFIN
Defendant

KALAL & HABERMEHL
Attorneys for the Defendant
217 South Hamilton Street, Ste 209
Madison, WI 53703
(608) 255-9295

By: /s/ Alan G. Habermehl
ALAN G. HABERMEHL

IN THE CIRCUIT COURT
ROCK COUNTY, WISCONSIN

[Caption Omitted in Printing]

HEARING ON MOTION TO SUPPRESS, JULY 15, 1983

[R. 38, pp. 3-41]

• • • •

MICHAEL T. LEW, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: You may be seated. Please state your full name and spell your first and last name.

WITNESS: My name is Michael, spelled M-i-c-h-a-e-l, middle initial T., last name L-e-w.

THE COURT: Ms. Buker, you may question the witness.

MS. BUKER: Thank you, Judge.

DIRECT EXAMINATION BY MS. BUKER:

Q How are you employed, sir?

A I'm a supervisor for the State Bureau of Probation and Parole here in Beloit.

Q How long have you had that position?

A Five years.

Q Is there currently a person named Joseph Griffin on probation to your department?

A Yes, there is.

Q Is he in the courtroom?

A Yes, he is.

Q Where is he sitting and what is he wearing?

A He's got a red shirt, sitting immediately in front of me.

MS. BUKER: Let the record show the witness has identified the defendant.

THE COURT: Yes, the record will show the witness has identified the defendant, Joseph G. Griffin.

BY MS. BUKER:

Q On April 5th, 1983, did you participate in a search of Mr. Griffin's residence?

A I did.

Q Why did you decide to search his residence?

A We received a phone call from the Beloit Detective Bureau early that morning indicating that they had information, we received information from the Beloit Detective Bureau indicating that Mr. Griffin may have had guns in his apartment.

MR. HABERMEHL: Your Honor, I'm going to object to that statement coming in.

THE COURT: The grounds of your objection?

MR. HABERMEHL: Hearsay.

THE COURT: The purpose in offering this testimony, Ms. Buker?

MS. BUKER: To show the witness's motive for doing what he did.

THE COURT: The objection is overruled. That is not hearsay. You may proceed, counsel.

MS. BUKER: Thank you.

BY MS. BUKER:

Q Under the rules of probation what do you need before you may decide to search a probationer's residence?

A Under Chapter 328 we either need a probable cause to believe there is contraband, or we need the authority of the supervisor of that unit.

Q Are you the supervisor of this unit?

A Yes.

Q Who went with you to search Mr. Griffin's residence?

A Ms. Joanne Johnson, one of my agents.

Q Did you request that any other persons accompany you?

A Yes. I requested assistance from the Beloit Police Department.

Q Why did you do that?

A For protection.

Q Do you carry a gun?

A I do not.

Q Does Ms. Johnson?

A No.

Q Okay. Where was Mr. Griffin's residence, if you recall?

A I don't recall the exact address.

Q Okay. Would it be 1021½ Central Street?

A I believe so.

Q Was anyone home when you got there?

A Yes. Mr. Griffin was home and a young lady was there also.

Q Was there anything that was confiscated during the search that you found?

A Yes. We confiscated a handgun, .357 Magnum handgun, and some brown, leafy substance we believed to be marijuana.

Q Who found the handgun in the residence?

A I did.

Q Where did you find it?

A Found it in kind of a small dresser or table in the living room.

Q Was there any ammunition for that gun there?

A There was some ammunition in the room. I did not find the ammunition.

Q Did the police officers do any searching that you saw?

A No.

Q Who did all the searching?
A Ms. Johnson and myself.
MS. BUKER: I have no other questions.
THE COURT: Cross-examination, Mr. Habermehl?

CROSS-EXAMINATION BY MR. HABERMEHL:

Q Mr. Lew, from whom did you get this information from the police department?
A It was from one of the detectives. I don't recall exactly. Probably it was Truett Pittner, but I can't be sure.
Q And the exact information that Truett Pittner, assuming it was him, gave you was that Mr. Griffin may have had guns in his residence?
A That's correct.
Q Did you make the arrangements with Mr. Pittner to obtain police officers to go along with you to do your search?
A No, I did not. I was going to originally wait for the officer or agent of record to return. When he didn't return within a couple of hours from the previous arrangement, I then made arrangements.
Q With whom did you make those arrangements?
A With somebody from the Detective Bureau, probably Truett. I can't be sure.
Q Do you recall if it was the same person that you talked to earlier or not?
A I don't recall.
Q How long did you wait?
A Two or three hours.
Q And when you called back to the police department to make arrangements for having officers come with you, what did you tell that person you talked with?
A I told them I was going to do a search and I would like some police protection.
Q What did you tell them you were going to do a search of?
A Of Mr. Griffin's apartment.

Q His residence?
A Yes.
Q When you went to the place that you went to, you believed that to be Mr. Griffin's residence; did you not?
A Yes, I did.
Q Did you know at that time if anyone else lived with Mr. Griffin at that residence?
A No.
Q Did you do anything to try and find out?
A No.
Q Was there another person present on the premises when you arrived?
A Yes, there was.
Q Was it a young lady?
A Um hum.
Q Did you ask that person to identify herself?
A No, I didn't.
Q During the course of that entire search, by the way, how long, how long were you at Mr. Griffin's residence?
A Approximately an hour.
Q Okay. During the course of that hour, how long was this young woman around?
A Approximately a quarter of that time. She left shortly after we arrived.
Q During the time she was there, or even afterwards, did you attempt to ascertain her identity?
A No.
Q Did Mr. Griffin volunteer anything to you about her identity?
A To me, no.
Q In your presence did he say anything about who that person was?
A I don't recall.
Q Now, when you first got to the residence, how many police officers were with you?
A Three.
Q Were they in uniform or plain clothes?
A Plain clothes.

Q When you got up to the door, who answered the door?
A Joe did.
Q Mr. Griffin?
A Yes.
Q The defendant. And what did you tell him you were doing there?
A I told him that we were going to search his residence.
Q Okay. And behind you was Ms. Johnson?
A Correct.
Q And these three officers?
A Correct.
Q Did you tell Mr. Griffin who Miss Johnson was?
A Yes.
Q And what did you tell him she was?
A I told him she was another probation officer coming with us to assist in the search.
Q Excuse me. I got ahead of myself. Did Mr. Griffin recognize you or you him?
A I'm not sure if he recognized me or not. I identified myself to him. Or I don't know if he recalled who I was.
Q Did you recognize him at that time?
A I recognized Joe, yes.
Q And did you also then tell Mr. Griffin who these three police officers were?
A I didn't name them. I told him they were police officers.
Q Okay. And then the five of you came into his house?
A Correct.
Q And where in the house was the marijuana found?
A I didn't find the marijuana.
Q Okay. Do you know where the marijuana was found?
A From my reports it was on a table in the living room also.

Q Did you walk through that living room at any time?
A Yes.
Q When you walked through the living room did you see the marijuana?
A I didn't notice it at first, no.
Q Okay. And so the first you would have seen of the marijuana was someone else had already got it in their possession?
A That's correct.
Q Who was that person that had it?
A Ms. Johnson.
Q And the first you saw the gun was when?
A When I found it.
Q Okay. And when you came in through the door, does that open into the living room?
A If I recall, it opens in kind of a hallway foyer.
Q And from the foyer where did you go next?
A I went into the kitchen, which was to the left.
Q And did Mr.—Ms. Johnson go with you?
A She went into the bedroom area, which was back to the left also.
Q Neither one of which is the living room?
A That's correct.
Q Where did the police officers go?
A They went into the living room.
Q And you went—I'm sorry, you said you went to the kitchen?
A Yes.
Q And where did you go—that isn't where you found either the gun or the marijuana?
A That's correct. I found neither of them there.
Q These were both found in the living room?
A That's right.
Q Where did you go from the kitchen?
A I went to the living room.
Q And at that time was Ms. Johnson already there?
A I don't recall exactly where she was at that time.

Q All right. And at that time you still didn't notice any marijuana anywhere?

A At that time I did not.

Q Okay. And at that time one of the officers informed you that there was a gun in this drawer under the TV?

A Well, he didn't inform me. What happened was I was walking toward the area where that table was.

Q All right.

A And there was a drawer that was half emptied.

Q Uh huh.

A He pointed to that area that I was walking toward. And as soon as I got there, I found the gun.

Q All right. An officer pointed toward it?

A He pointed toward that direction.

Q But didn't say anything?

A No.

Q But he did direct your attention to it?

A To the area, not—he didn't say, "There's a gun there."

Q But he did direct your attention to that area?

A That's correct.

Q And when you went over to the area, then you saw the gun?

A That's right.

Q What did you do with the gun?

A I checked to see if it was loaded. And when I ascertained that it was not, I turned it over to the police department for safekeeping.

Q And they property tagged it and bagged it?

A That's correct.

Q Right on the spot?

A They took charge of it. I'm not sure exactly what they did with it.

Q Do you remember the names of the three officers that went with you?

A Officer Lathrop, Officer Leppla and Officer Hanson.

Q And those are from the Beloit Police Department?

A Correct.

Q Do you know which one pointed towards that area?

A No, I didn't.

Q Do you remember which one of them took control of the gun?

A I do not.

Q What happened to the marijuana?

A We took charge of the marijuana.

Q When you say "we", who took it? You or Ms. Johnson?

A Ms. Johnson.

Q Did she put it in any additional bag or property wrapping or anything?

A Yes, she did.

Q What kind of thing did she put it into?

A Large plastic Zip-Lock bag.

Q And later on to your knowledge did the police department request a sample of that stuff to test or the District Attorney's office?

A Not to my knowledge.

Q Was there more than that one—I'm sorry, would you just describe briefly what this is that you're referring to as the marijuana? I mean what did that consist of?

A I really can't describe it in detail, 'cause I didn't look at it. Once I had found the gun, I was less concerned with what purported to be the marijuana.

Q What is your best recollection, if you have one, of what it looks like or what it looked like then?

A It looked like to me like a small amount of marijuana.

Q Okay. I'm not trying to be tricky. I want the gross physical appearance. Was it in a baggie? Was it loose on the table?

A It was in a baggie.

Q Okay. And all the marijuana that was seized was contained inside that baggie?

A That's correct.

Q Okay. And that baggie in turn went into another Zip-Lock bag that Ms. Johnson had?

A Yes, that's correct.

Q Okay. To your knowledge other than that baggie of marijuana was any other marijuana or suspect marijuana taken from Mr. Griffin's apartment on that day?

A To my knowledge, no.

Q When you were looking through Mr. Griffin's residence, did you notice any signs that it was inhabited by a female person?

A Yes.

Q What kind of signs did you notice?

A There was some female clothing in one of the bedrooms.

Q I gather if I follow your steps so far you went from door to foyer to kitchen to living room?

A Correct.

Q I gather you did not cease your search at that point?

A I did not.

Q What else did you search in the house?

A I went back to recheck the bedroom area that Ms. Johnson had checked.

Q And is that where you saw the female clothing?

A Yes.

Q Did you see anything else that would lead you to believe that someone other than Mr. Griffin was living there?

A No.

Q Did you ask Mr. Griffin at any time if someone else was living with him?

A No.

Q Did you ask Ms. Johnson if she knew if someone else was living with him?

A Ms. Johnson wouldn't have known. She wasn't his agent.

Q And I recall you testifying you didn't look ahead of time into Mr. Griffin's probation file to see if anyone might be living with him?

A I did not.

Q How did you know where to go to find—strike that. How did you know the address of his residence?

A 'Cause he gives us an official address for probation purposes.

Q Okay. But what I'm saying, I assume you didn't carry that in your memory. How did you find it out?

A I looked in the file to find the address.

Q And that's the only thing you looked in the file to find?

A Right.

Q How did Mr. Griffin come to be taken into custody?

A Having found the weapon, I directed the police to take him into custody on a probation violation apprehension.

MR. HABERMEHL: I have nothing further.

THE COURT: Redirect examination, Ms. Buker?

REDIRECT EXAMINATION BY MS. BUKER:

Q Mr. Lew, an officer directed your attention to a portion of the living room; is that right?

A Yes. It's not that he directed my attention. He kind of pointed at the direction I was walking. It wouldn't have changed my, the, where I was going in any event.

Q And in that area towards which you were walking there was a table, an end table?

A Yes.

Q And there was a half-open drawer in the table?

A That's correct.

Q Where was the gun in the table?

A It was in the drawer.

Q Could you see it before you opened the drawer any further?

A Um hum, yes, I could.

Q Would it have been visible to the officer where he was standing?

MR. HABERMEHL: Objection. Calls for speculation.

THE COURT: Overruled. He may answer if he knows. You can cross-examine him concerning that.

A I suppose it would be visible.

MS. BUKER: I have nothing further.

MR. HABERMEHL: I have a few then.

RECROSS-EXAMINATION BY MR. HABERMEHL:

Q This drawer, you say it was open?

THE COURT: He said it was half open.

A Half open.

BY MR. HABERMEHL:

Q You said it was half open. Okay. Are you saying that the drawer was—strike that. Would you describe the overall appearance of this table that the drawer was a part of?

A Well, I can't recall in detail. It was a small table, and it was a drawer insert in it to my recollection. The drawer was partially open, and the weapon, the handgun, was visible without opening it further.

Q Okay. About how tall was the table?

A I don't recall.

Q Waist high? Knee high? Shoulder high?

A Between knee high and waist high.

Q And on top of this table was a T V set?

A Yes.

Q And how many drawers were in the table?

A I don't recall.

Q Was this drawer at the top of the table, the one that was open?

A I'm not sure.

Q Now, when you say it's open, do you mean that it was pulled out of the—

A Yes.

Q —dresser itself? Is it impossible that it was just broken at the top of the drawer and allowed some view?

A It could have been, yes. I do not recall exactly how far it was open.

Q So it's not so much whether the drawer was open, you just recall there was a space through which you could see into the drawer?

A Yes.

Q And it's perfectly possible that the police officer could have seen into that drawer also?

A That's correct.

Q And the police officers were in that room before you were?

A Yes, they were.

Q And this police officer, you can't remember which one pointed at least in the direction of that table?

A That's correct.

Q Did he look at you while he was pointing?

A I don't recall.

Q Do you recall if he said anything to you?

A I don't recall him saying anything.

MR. HABERMEHL: I have nothing further.

THE COURT: Anything further, Ms. Buker?

MS. BUKER: No, Judge.

THE COURT: Thank you. Officer, you may step down. Is this witness excused then?

MS. BUKER: Yes.

THE COURT: You are excused and free to go then, Mr. Lew.

MR. LEW: Thank you.

THE COURT: Thank you.

MS. BUKER: Do you want to go on with the testimony from this?

MR. HABERMEHL: I have no preference. If it would make more sense to the Judge, finish it.

THE COURT: I think we might as well proceed with this at this time.

MS. BUKER: Okay. Call Ms. Johnson.

THE COURT: Ms. Johnson, would you please come to the witness stand. Before being seated, please raise your right hand. The Clerk to my left will swear you as a witness.

JOANNE JOHNSON, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: You may be seated. Please state your full name and spell your first and last name.

WITNESS: Joanne Johnson. J-o-a-n-n-e J-o-h-n-s-o-n.

THE COURT: Ms. Buker, you may question this witness.

MS. BUKER: Thank you.

DIRECT EXAMINATION BY MS. BUKER:

Q How are you employed, Ma'am?

A I'm a probation agent with the Bureau of Community Corrections.

Q Okay. Are you the probation officer who accompanied Mike Lew during the search of Mr. Griffin's residence on April 5th, 1983?

A Yes, I am.

Q As you entered the apartment, did anything catch your attention?

A Yes, it did.

Q What did?

A There was a baggie containing a vegetable substance that appeared to be marijuana sitting on the table in the living room.

Q What familiarity do you have with marijuana?

A Well, I've worked with the Division for ten years, and for approximately six of those years worked with security, so seized a great deal of marijuana during that time.

Q So you're familiar with the appearance and smell and feel of marijuana?

A Yes, I am.

Q Did you examine what you believed to be marijuana sitting on the table?

A Yes, I did.

Q And after examining it, did you have an opinion as to what it was?

A Yes, I did.

Q What was that opinion?

A I believed it to be marijuana.

Q Did anyone draw your attention to that substance?

A No.

Q You just saw it as you entered the apartment?

A Yes, I did.

MS. BUKER: I have no other questions.

THE COURT: Cross-examination, Mr. Habermehl?

CROSS-EXAMINATION BY MR. HABERMEHL:

Q Ms. Johnson, before April 5th, 1983, had you had any official contact with Mr. Griffin that you recall?

A Not that I recall.

Q You weren't his regular probation officer?

A No.

Q Do you know who was?

A Tom Ebert.

Q When you went out to the apartment you were accompanied by Michael Lew?

A That's correct.

Q And three police officers of the Beloit Police Department?

A They met us there, yes.

Q Okay. So when you went into the apartment all five of you went in together?

A Yes.

Q And as you go in the door there's kind of a foyer or entryway?

A That's correct.

Q And then you went from there into a bedroom; right?

A That's correct.

Q And that's not where the marijuana was; was it?
A No.
Q When did you first see the marijuana?
A When I first got into the apartment, I just looked around and I saw it. It was—there's a door leading into the living room, and there was a table right here, and it was lying on the table.
Q And at that point you saw it but didn't do anything about it?
A I didn't take possession of it at that time.
Q Did you say anything about it to anyone?
A I believe—I don't know. I really can't recall. I may have.
Q So after making that observation you then simply walked into the bedroom?
A That's correct.
Q During the time you were on the premises, did you notice another person there?
A Yes, I did.
Q I mean other than Mr. Griffin is what I mean.
A Yes, uh huh.
Q And was that a woman?
A Yes, it was.
Q And was she black or white?
A Black.
Q Did you ask that person who she was?
A No, I didn't.
Q In your presence did anyone else ask her who she was?
A No.
Q Did you have any knowledge one way or the other as to whether Mr. Griffin was living with someone else at that place?
A No.
Q Did you try to find out?
A No.

Q When you got done looking in the bedroom, where did you go?
A I went for a few minutes into the kitchen and then into the living room.
Q When you went into the kitchen, was Mr. Lew still there?
A I believe that's why I went in there was to see how things were going.
Q And then you and Mr. Lew together went into the living room?
A He went into the living room first, and I followed.
Q How long a period of time we talking about between him going and you going?
A Very, very short period of time.
Q Are you essentially right behind him?
A No. No. Should I elaborate?
Q No, that's all right. That's all I want to know. When you got into the living room—I'm sorry, let me back up. When you went into the bedroom as you came into the apartment—
A Um hum.
Q —and Mr. Lew went into the kitchen—
A Um hum.
Q —did you see the police officers go into the living room?
A Yes, I did.
Q All three of them?
A I can't recall if they all went in, no.
Q So when you got back to the living room, those three police officers and Mr. Lew were all there already?
A Yes.
Q When you got into the living room, did Mr. Lew already have a gun in his hand?
A Yes, he did.
Q And this suspect marijuana you referred to, where was that when you got back?
A Still on the table.
Q In everyone's plain view I gather?
A Yes.

Q And at some point you picked that up?
A Yes.
Q And put it into a plastic baggie?
A No.
Q What did you do with it?
A There were a number of plastic baggies there, and I picked them—
Q What did you do with the marijuana?
A I picked them all up together. I had a brown paper bag that I was putting everything in, and it went into the brown paper bag.
Q You wouldn't call a brown paper bag a Zip-Lock bag; would you?
A No, but I did have in my possession Zip-Lock bags.
Q But that's not where the suspect marijuana went?
A No.
Q It just went into this brown paper bag?
A Right.
Q What did you do with the brown paper bag?
A I gave it to the agent of record.
Q That's Ms.—I'm sorry, at the time was Mr. Hebert?
A Right, Ebert.
Q Ebert, I'm sorry, I didn't hear you correctly.
Did you see what he did with it?
A No, I did not.
MR. HABERMEHL: I have nothing further.
MS. BUKER: No redirect.
THE COURT: Thank you. You may step down. Is this witness excused?
MS. BUKER: Yes.
THE COURT: This witness, you are excused and free to go or you are free to remain in the courtroom.
MS. BUKER: Judge, I have no further testimony to present. The officer who arrested Mr. Griffin, and I'm not even exactly sure which one of the three it is, but Officer Lathrop was sent a subpoena, and he is not available, he is on vacation. I believe Mr. Keegan and Mr. Habermehl

had discussed continuing it if Mr. Habermehl wants to take testimony from the officer.
MR. HABERMEHL: We had agreed to that. I have another question. Where is Mr. Truett Pittner?
MS. BUKER: He didn't recall giving the information to the probation department, so I sent him home.
MR. HABERMEHL: Your Honor, I spoke with Mr. Keegan early this week. Mr. Keegan was covering—
MS. BUKER: For Mr. Hayes.
MS. HABERMEHL: —for Mr. Hayes, I guess Ms. Buker is also. And I specifically informed him I was going to subpoena Mr. Pittner to be here. And he told me he was going to subpoena Mr. Pittner, on which time I said in reliance on that I would not.
MS. BUKER: Okay. We can get him back. I thought it was the only reason he was wanted.
THE COURT: Do you want to see if a phone call can be made to Mr. Pittner? I'll get Mr. Gerhardt to see if he can make a phone call.
MS. BUKER: Okay.
THE COURT: Mr. Gerhardt,—if he—Would you see if you can, through the police department, reach Officer Truett Pittner and ask him if he would please come over to the Rock County Circuit Court, Branch 5, without delay.
BAILIFF: He has not been subpoenaed?
MS. BUKER: He was subpoenaed by the State, and I released him when I heard what I thought he had nothing to say about. The defense attorney wants to question him.
THE COURT: Now then, that would seem to me—
MR. HABERMEHL: No, I'm going to call the defendant, your Honor, briefly.
THE COURT: All right. Then we can put that testimony in.
MR. HABERMEHL: Why don't we do that now.
THE COURT: Mr. Griffin, would you please come to the witness stand. Before being seated, please raise your right hand. The Clerk will swear you as a witness.

JOSEPH G. GRIFFIN, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: You may be seated.

WITNESS: My name is Joseph G. Griffin. My last name is spelled G-r-i-f-f-i-n.

THE COURT: Mr. Habermehl, you may question this witness.

DIRECT EXAMINATION BY MR. HABERMEHL:

Q Mr. Griffin, are you the defendant in the actions you've heard the Judge call today?

A Yes, I am.

Q And you've heard the testimony of Michael Lew and Joanne Johnson today?

A Yes, I have.

Q You understand we're referring here today to a search that happened in your residence on April 5th, 1983?

A Yes.

Q At that time where did you live?

A 1021 ½ Central.

Q And is that where the search occurred?

A Yes.

Q At that time how long had you lived there?

A About 16 months.

Q And did you live there with anyone else?

A Yes. All the 16 months with my girlfriend, Tanya Turner.

Q And anyone else live there with the two of you?

A Yes, my little daughter.

Q Your daughter's name and date of birth?

A Joneenah Janeice Turner (phonetic), and her date of birth is April 8th, 1982.

Q Okay. Around April of 1983 who was your regular probation officer?

A Tom Ebert.

Q And did that person know that you were living with Ms. Turner and your child?

A Yes.

Q How did that person know that?

A By my monthly reports to him.

Q And in your monthly reports are you required to say who you're living with?

A Yes. Well, we're allowed, yo uknow, we're required to give facts to where we live and who resides there with us.

Q And you would have made monthly reports between that entire period of time you were living there?

A Yes.

Q And those reports would have reflected the fact that you were living with Miss Turner and your child?

A Yes.

Q Do you recall Mr. Lew, Ms. Johnson, and these three police officers coming to your residence on that day, April 5th, 1983?

A Yes.

Q And when they came inside where did Mr. Lew go? Did you notice?

A To the kitchen.

Q And where did Ms. Johnson? Did you notice?

A She went in the bedroom.

Q Where did the police officers go?

A They came in the living room with me and my girlfriend.

Q So you and Tanya and the three police officers were in the living room?

A Yes.

Q And neither Mr. Lew nor Ms. Johnson were there?

A No.

Q In this living room is there a T V?

A Yes.

Q Does it sit on a kind of table of some kind?

A Yes. It's like a night table.

Q About how high is that table?
A About three feet tall.
Q And does it have any drawers in it?
A Yes, it has one drawer.
Q Is that near the top of it?
A Yes.
Q Was there something about that drawer that made it possible to see inside it?
A Yes. It had a, like a piece of wood at the top that had broke off where you could still close the drawer, but it would be just a little bit of space between where you could see down into it.
Q Okay. And did any of the police officers say or do anything in connection with that drawer in that stand?
A I heard one of them say to the other one that there was a gun in the drawer.
Q And where were they standing when they said that? Do you know?
A Right over by the T V.
Q And how far away from them were you?
A About four or five feet.
Q Did those police officers do anything about it at that time?
A No.
Q At some point did Mr. Lew come back into the room?
A Yes.
Q Where did he come from?
A From out of the bedroom. I think he was coming out of there.
Q Did any of the police officers communicate with Mr. Lew at that time?
A I thought I heard one of them say, "There's a gun in that drawer." And he immediately went to the drawer and opened it.
Q Who immediately went to the drawer?
A Mr. Lew.

Q And it was one of the police officers that made the statement?
A Yes.
Q And when Mr. Lew opened the drawer, what did he do?
A He pulled this gun out and held it up by his fingers.
Q To your knowledge had your residence been searched before by police officers?
A Yes.
Q When?
A April—August 12th, 1982.
Q And do you know if they had a warrant that time?
A Yes.
Q Were you there when they came?
A Yes.
Q Did they say they had a warrant?
A Yes.
Q Do you know what the warrant was based on?
MS. BUKER: Judge, I'm going to object on relevance grounds.
THE COURT: How is that relevant, counsel?
MR. HABERMEHL: I'll withdraw that.

BY MR. HABERMEHL:

Q Was anything found?
A No.
MR. HABERMEHL: I have nothing else for Mr. Griffin.
THE COURT: Cross-examination, Ms. Buker?
MS. BUKER: Thank you.

CROSS-EXAMINATION BY MS. BUKER:

Q Mr. Griffin, the drawer that the gun was in, was that open or shut?
A It was shut.
Q Could you see the gun with the drawer shut?
A I guess you have to be looking for something to see it in there. There was a lot of other things in there, too.

Q Okay. But with the drawer shut and the piece missing, could someone who was looking at that table see the gun in the drawer?

A Yes, if they looked at the proper angle I assume they could see in the drawer.

Q Okay. You think a police officer said twice, "There's a gun in that drawer."?

A Yes. He said once to one of the other officers, and then he instructed Mike Lew there was a gun in the drawer.

Q Okay. It was the same officer who said it both times?

A Yes, I'm quite sure it was.

MS. BUKER: I have no other questions.

MR. HABERMEHL: Two.

REDIRECT EXAMINATION BY MR. HABERMEHL:

Q How close do you think you'd have to get to that table to actually see into the drawer through the space that there was?

A Within three feet.

Q And the first time one of the officers said, "There's a gun in that drawer," the first time to whom did that officer address that remark?

A To another police officer.

Q And at the time that first remark was made, was either Mrs.—sorry, Mr. Lew or Ms. Johnson present in the living room?

A No, not the first time.

MR. HABERMEHL: Nothing further.

MS. BUKER: One question.

THE COURT: Anything further?

MS. BUKER: Yes.

RECROSS-EXAMINATION BY MS. BUKER:

Q Have you ever been convicted of a crime before?

A Yes.

MR. HABERMEHL: Ojection. It's irrelevant.

THE COURT: How is that relevant?

MS. BUKER: His testimony contradicts the testimony of Mr. Lew. Therefore, his credibility is at issue. Whether or not he's been convicted of a crime bears on his credibility.

MR. HABERMEHL: If we're going to go through a regular hearing on this, fine. I'd like to see the rap sheet. We can have the hearing on it. I really don't think it's relevant, though.

THE COURT: His answer will stand. The objection is overruled.

BY MS. BUKER:

Q Do you know how many times you've been convicted of a crime?

A No.

MR. HABERMEHL: I renew my objection specifically based on the grounds we have not had the proper hearing under the evidence code to allow either of those questions or answers.

MS. BUKER: I'm finished. He doesn't know how many times and I don't either.

THE COURT: Very well. You may step down.

MR. HABERMEHL: I have no other witnesses at this point. I don't know what might happen after Mr. Pittner's testimony.

MS. BUKER: Okay. Mr. Gerhardt indicated that Captain Pittner is on his way.

THE COURT: Very well. I wonder if we could take up either of the other motions. What about the motion in Case Number 1442, there is a motion to dismiss Count Two of the Information. And that seems to be the singular motion in that case. Isn't that correct?

MS. BUKER: Is that the battery?

MR. HABERMEHL: No.

MS. BUKER: Okay.

THE COURT: That is the case concerning the possession of a controlled substance.

MR. HABERMEHL: It's the only motion to dismiss that count that I have.

THE COURT: All right. Can we take that up now? Is there any objection?

MS. BUKER: No.

MR. HABERMEHL: No, that's fine.

THE COURT: Very well. The motion is yours, Mr. Habermehl, and I will—well, first let me ask Ms. Buker, do you object to the Court granting the motion?

MS. BUKER: Yes.

THE COURT: All right. Mr. Habermehl, then briefly, I've read your brief, but briefly I will hear you. Particularly I'm interested in hearing—well, Mr. Pittner is here. In order to save his time we will proceed with that testimony. Mr. Pittner, would you come immediately to the witness stand, please.

TRUETT WILLIAM PITTNER, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: You may be seated. Please state your name and spell your first and last name for the Reporter.

WITNESS: Truett, T-r-u-e-t-t, William Pittner, P-i-t-t-n-e-r.

THE COURT: Mr. Pittner, you have been called as a witness by Mr. Habermehl. Mr. Habermehl, you may question the witness.

DIRECT EXAMINATION BY MR. HABERMEHL:

Q On April 5th, 1983, how were you employed?

A As a detective captain with the Beloit Police Department.

Q How long had you been so employed?

A By the Beloit Police Department or the Detective Bureau?

Q In the Detective Bureau?

A Mostly since 1971 in the Detective Bureau.

Q Do you recall being contacted by either Michael Lew or any other person connected with the people at the division, I'm sorry, the Bureau of Community Corrections in Beloit on April 5th 1983, regarding Mr. Griffin?

A I don't recall for sure, sir.

Q Do you recall contacting them?

A I believe it was one of my detectives who contacted the Probation and Parole Department in regards to Mr. Griffin.

Q So you don't believe it was you?

A I don't believe so.

Q And for your information a search was conducted on Mr. Griffin's apartment that day along with three Beloit police officers, Læppla, Hanson and Lathrop. Do you know them at least by name?

A Yes, sir. They was assigned to the Detective Bureau at that time.

Q Do you know how the arrangements came to be made to have those three officers go to Mr. Griffin's residence on April 5th?

A I know it only through my conversations with those detectives on or about that day.

Q What did they tell you as to how the arrangements were made?

A I recall that one of those detectives I'm quite sure received reliable information—

Q No, how did they tell you the arrangements were made to have them go to the apartment to be in on the search, if anything?

THE COURT: Do you want the question read to you again?

BY MR. HABERMEHL:

Q Was that confusing?

A I believe I understand it. I'm just trying to recall.

THE COURT: Wait. Let's just have the question read to him, and then if it is understandable you may answer the question.

MS. BUKER: I think he indicates that he does understand the question. He's just thinking what the answer is.

THE COURT: Well, let's read the question to him.

(Whereupon the previous question was read.)

THE COURT: I don't understand the question.

MR. HABERMEHL: Okay. Let me back up.

BY MR. HABERMEHL:

Q Someone must have called the police department to request the assistance of some police officers to participate in some fashion in the search; right? You have to say yes or no.

A That's correct.

Q Okay. Do you know of your own knowledge how those arrangements were made regarding the search that occurred on Mr. Griffin's apartment on April 5th, 1983, and regarding those three officers?

A If I recall, one of the detectives called the Probation and Parole office.

Q No, you still don't understand my question.

A I think I do if I could go all the way through it.

Q I don't want you to go through it. I would like you to simply answer the question. Never mind, I'll withdraw the question.

MR. HABERMEHL: I don't have anything further.

THE COURT: Ms. Buker?

MS. BUKER: No cross.

THE COURT: You may step down, Mr. Pittner, from the witness stand. Thank you. Now, do I understand somebody mentioned one other witness that was not available now, and you have agreed that this matter will be continued to a later date?

MR. HABERMEHL: Our specific agreement was that if it appeared that this person was necessary, because the officer was on vacation, I agreed that I wouldn't make a stink about him not being today.

MS. BUKER: I don't think he's necessary. He may be the person that placed Mr. Griffin under arrest, but I think the testimony already taken shows that he was placed under arrest by police officers after the materials were found and the Probation Department said, "Please arrest him." So I wouldn't put him on unless Mr. Habermehl desparately wants him.

MR. HABERMEHL: I have no need of that officer coming, and I do not request his presence.

MS. BUKER: Then we're finished with that.

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IN THE CIRCUIT COURT
ROCK COUNTY, WISCONSIN

[Caption Omitted in Printing]

ORAL DECISION ON MOTION TO SUPPRESS
AUGUST 15, 1983 [R. 39, pp. 19-26]

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THE COURT: Thank you. I think the language in *State v. Tarrell* in this regard is helpful, at least as far as this Court is concerned. And in *State v. Tarrell*, reported at 74 Wis. 2d 647, at page 652, the Supreme Court stated:

> "The defendant Tarrell who was on probation as stated above was told by his probation agent to go to the police station to have his picture taken. He complied with this order but contends that this requirement—this required appearance was an unconstitutional seizure of his body and that the subsequent photographic seizure of his person was also unconstitutional in that they violated the fourth amendment of the United States Constitution."

And then the Court states as follows:

> "The courts recognize that probationers do retain some fourth amendment rights. 'It is not the law that a person convicted of a previous offense loses his constitutional guaranties.' Concomitantly, this court has recognized that there are constitutional limitations on conditions of probation. The question is what is the extent of this protection.
>
> "The fourth amendment requirement is that searches and seizures be reasonable. . . .
>
> ". . . This court has consistently adhered to the view that reasonableness is to be determined by the facts and circumstances presented in each case. . . . The fundamental rule applicable to searches and seizures is that warrantless searches are per se unreasonable under the fourth amendment except under certain circumstances." And then they cite an earlier Wisconsin case, and there it is stated:

> "'"Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'"'"

And at page 654:

> "The ultimate standard set forth in the fourth amendment is reasonableness. One condition of probation requires the probationer to obey all laws of the State of Wisconsin. The agent has a duty to determine whether a probationer is complying with all probation conditions."

And then skipping down, "While there may not have been probable cause for the issuance of a warrant, there was probable cause for the agent's attempt to determine whether Tarrell had complied with the probation conditions. The application of a less stringent standard for the probation agent's search or seizure is appropriate because of the nature of probation. It coincides with the agent's dual role of assisting the probationer in his rehabilitation and protecting the public."

That case of *Tarrell* and that portion of *Tarrell* was cited in a later case, *State v. Monahan*, 76 Wis.2d 387, a decision by the Wisconsin Supreme Court in 1977. And at page 395 the Court states:

"Having determined that a search took place, the issue becomes whether the search was circumscribed by either the Fourth Amendment to the United States Constitution or Article I, section 11 of the Wisconsin Constitution. . . . The Fourth Amendment requires searches and seizures to be reasonable." And then citing *State v. Tarrell.* " 'The fundamental rule applicable to searches and seizures is that warrantless searches are per se unreasonable under the Fourth Amendment except under certain well-defined circumstances.' There was no warrant to search Hills' house. If this warrantless search is to be found reasonable it must fall within one of the 'specifically established and well-delineated exceptions' to the warrant requirement."

In this case I think it is helpful to look at the citation that Mr. Hayes gave the Court on warrantless searches, the annotation at 32 ALR Fed. And the annotation begins at page 155. And at 160 the author of that annotation states as follows:

"Three general standards"—and I think this succinctly puts the question—"Three general standards of reasonableness have been applied to a parole officer's warrantless search of a parolee." Or in this case it's a probationer. "At one extreme there is the view that the Fourth Amendment standards are the same for parolees as for other citizens. The court taking this view seems to consider the Fourth Amendment reasonableness standards to be inflexible holding that since the parolee did not lose his Fourth Amendment rights he has the same rights as any other person, whereas the other courts take the view that what is reasonable in one situation might not be reasonable in another situation.

"At the other end of the scale, there is the view that a parole officer's warrantless search of a parolee or his premises is a reasonable search under

the Fourth Amendment even though the parole officer has neither probable nor reasonable cause to believe that the parolee has violated the terms of his parole. The primary basis for this view is that the parolee remains in custodia legis. Between these two positions is the view that these warrantless searches are valid only if the parole officer possesses a 'reasonable cause' to believe the parolee is violating or is about to violate the terms of his parole. Reasonable cause is said to require less evidence than probable cause, but requires some objective evidence sufficient to at least stimulate the parole officer's suspicion. A parole officer's search simply on impulse, or a routine search to keep the parolee honest, would seem to be unreasonable under this view."

And it seems to me that that is what our Court was saying in the case of *State v. Tarrell*, and that decision is by Chief Justice Beilfuss. And he has said in that case that probationers do retain Fourth Amendment rights, and the question is to the extent of the protection. And, "This court has consistently adhered to the view that reasonableness is to be determined by the facts and circumstances presented in each case."

Number one, I do not find that this was, in fact, a police search. This information was furnished to the probation agent. The agent was told by a Beloit police detective that they believed that there were guns in the probationer's apartment, or maybe there were guns in the probationer's apartment. But it didn't come as an anonymous tip, and it didn't come from an average citizen. And, as a matter of fact, the tip didn't come from an ordinary patrolman. It came from a detective on the Beloit Police Department.

And after that information was reported, the supervisor of the Division or Department of Probation and Parole apparently after considering this matter deter-

mined that he would make a search of the defendant's home. And then he called the police department and requested officers to accompany him and the agent who was going to go with him in making that search for protection.

And as I recall the evidence, it was specifically indicated that the purpose of the officers going with the probation and parole officer was for the purpose of protection. And as a matter of fact, the acts of the officers at the premises would bear out those statements in that the testimony shows that Mr. Lew, one of the probation officers, went and searched one room, Johnson went—another probation officer searched another room while the Beloit police officers remained in the living room with the defendant and with the woman who was living there.

And then it was after the search had been made of the two rooms off the living room by the probation officers that Mr. Lew then came back into the living room, and Mr. Lew apparently in plain sight viewed the marijuana that was sitting on a table, and in a drawer which was broken and because it was broken once you got within several feet of the table you could view a gun that was in this drawer in the table.

True enough apparently the officer did point in the general direction of the table. But, nevertheless, I find based upon a reasonable interpretation of the evidence that the purpose of the officers in going to the residence of Mr. Griffin was for the protection of the probation and parole officers in making their search and was specifically at the request for that purpose.

The question then gets down to whether or not the probation officer in making his search acted reasonably. And based upon the evidence before the Court, I find that he did act reasonably. The probation and parole officer was furnished information by a detective of the Beloit Police Department, that they believed that there were guns or maybe there were guns in this probationer's apartment, his residence. And the probation and

parole officer has an obligation to determine whether or not his person on probation is violating the laws of the State of Wisconsin or violating any of the conditions and rules of probation. And I believe that he has acted reasonably in making this search and that, therefore, this is not a violation of the condition or of the Fourth Amendment privileges of the defendant.

I would say that I have read carefully the decisions set forth in the annotation 32 ALR Fed 155, those decisions being the decisions under the heading Parole Officer acting on Tip from Police. And those cases in which the search was held to be reasonable are cases reported *Santos v. New York*, a 1971 case; *People v. Hernandez*, a 1964 case; and *People v. Quilon*, a 1966 case; *People v. Limon*, a 1967 case; *People v. Thomas*, a 1975 case; *Himmage v. State*, a 1972 case; and *People v. Santos* again, a 1969 case; *People v. Adams*, a 1971 case; *People v. Adams*, a 1970 case; and then in the pocket part there are more recent cases, *United States v. Gordon*—well, first, *State v. Morgan*, 1980 case from Nebraska; and then a ninth circuit case, *United States v. Gordon*; and then *Roman v. Alaska—Roman v. State*, which is an Alaska case; and then finally *Gonzales v. the State*, another Alaska case.

And based upon the reasoning that I have stated and the citations of authority, the motion to suppress—st.ike that—the motion to dismiss because of an illegal arrest and the motion to suppress the evidence are each denied.

Now, the next motion is the motion to dismiss the habitual criminality allegation. And, Mr. Habermehl, I will hear you concerning that.

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IN THE CIRCUIT COURT
ROCK COUNTY, WISCONSIN

[Caption Omitted in Printing]

TRANSCRIPT OF TRIAL, AUGUST 18, 1983

[R. 40, pp. 57-77, 98-114]

THE COURT: Mr. Habermehl, thank you. Mr. Hayes you may call your first witness.

MR. HAYES: I'd call Mike Lew.

THE COURT: Mr. Lew, would you please come to the witness stand. Before being seated, please raise your right hand. The Clerk to my left will swear you as a witness.

MICHAEL T. LEW, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: Please be seated. Please state your full name and spell your first and last name.

WITNESS: My full name is Michael, Middle initial T., last name Lew, L-e-w.

THE COURT: Mr. Hayes, you may question this witness.

MR. HAYES: Thank you, your Honor.

DIRECT EXAMINATION BY MR. HAYES:

Q Mr. Lew, will you please tell the jury where you work?

A I work for the State Department of Health and Social Services, Bureau of Probation and Parole.

Q And what do you do there?

A I'm a supervisor there.

Q How long have you held that employment?

A Approximately five years.

Q During the course of your employment have you come into contact with a subject by the name of Joseph Griffin?

A I have.

Q Do you see him now—

A I do.

Q —in the courtroom? Would you identify him, please?

A Mr. Griffin is sitting immediately in front of me wearing a white T-shirt.

THE COURT: Let the record show that this witness has identified the defendant, Joseph G. Griffin.

BY MR. HAYES:

Q I'd asked you to bring certain records concerning Mr. Griffin with you held by your Department. Do you have those records?

A I do.

Q Do those records reveal the address of Mr. Griffin on or about April 5th of 1983?

A They do.

Q And that address was?

A 1021½ Central.

Q And what city, county and state?

A City of Beloit, County of Rock, State of Wisconsin.

Q Do those records reveal when he informed your Department of that address?

A It was prior to April 5th. I don't have the exact date that he revealed that address to us.

Q Is there a particular form that Mr. Griffin or someone fills out?

A It's called a Monthly Report.

Q And do you have those reports with you?

A I do.

Q Would reviewing those reports refresh your recollection as to when he started claiming that as a residence?

A Well, it may take some time for an exact review because I wasn't the agent of record, but—I have a

report dated 12-16-82 which he listed that as his address. That's the earliest monthly report I have of that address.

Q Okay. Do any of the reports from that date, that report or any subsequent reports indicate with whom, if anyone, he was residing?

A No.

Q Is that knowledge required by the Department?

A Yes. Is the knowledge of people living with him required?

Q Yes.

A Not necessarily.

Q Directing your attention specifically now to April 5th of this year, in your capacity in the Probation and Parole Department as a supervisor did you receive a phone call?

A I did.

Q Concerning Mr. Griffin?

A Yes.

Q And from whom?

A From the Beloit—

MR. HABERMEHL: Objection, your Honor. This is not relevant.

THE COURT: How is it relevant, Mr. Hayes?

MR. HAYES: It's going to go to explain why he took the actions that he took.

THE COURT: The objection is overruled. Read the question to the witness, and you may answer the question.

(Whereupon the previous question was read.)

A From the Beloit Police Department Detective Bureau.

BY MR. HAYES:

Q And that was concerning what type of activity, if you recall?

MR. HABERMEHL: Objection, hearsay, confrontation, it's irrelevant.

THE COURT: Mr. Hayes?

MR. HAYES: Again I'm not offering it for the truth of the matter asserted. I'm offering it only to show why this witness did what he did.

THE COURT: The objection is overruled. Read the question to the witness, and you may answer that question.

(Whereupon the previous question was read.)

A The officer who called me indicated that they had received information that Mr. Griffin had in his possession at his residence contraband material.

BY MR. HAYES:

Q Okay. Any mention of a gun?

A Yes.

Q And that's what you're referring to?

MR. HABERMEHL: Same objection. Move to strike.

THE COURT: Overruled. The motion to strike is denied.

A Yes.

BY MR. HAYES:

Q With that information what did you do?

A Initially Mr. Griffin's agent of record was not there at the time I received the phone call. My initial reaction was to initiate a search of Mr. Griffin's apartment pursuant to our administrative rules, but I intended to wait till the return of the agent who officially supervised him.

Q Did you wait then?

A I waited for a number of hours.

Q Then what action, if any, did you take?

A It came to my attention that the agent was still tied up in another legal proceeding and would not be available immediately. I, therefore, instructed Agent Johnson to initiate a search of Mr. Griffin's residence,

and I went along on that search in order to provide assistance.

Q When you say Agent Johnson, would that be Joanne Johnson?

A That's correct.

Q Did you ask—did you request anyone else to accompany you?

A Yes. As per our normal procedure, I contacted the Beloit Detective Bureau, requested protection, additional officers to accompany us for protection.

Q And did officers go with you?

A Yes.

Q Did you go to Mr. Griffin's residence at 1021½ Central?

A We did.

Q And taking it from the knock on the door, did you knock on the door?

A Yes.

Q And who, if you recall, answered?

A Mr. Griffin.

Q What happened next?

A I identified myself and told Mr. Griffin why I was there. I then initiated a search of his residence.

Q Did you observe whether or not Miss Johnson searched the residence?

A Miss Johnson also searched the residence.

Q Did you observe whether or not the police searched the residence?

A They did not participate in the search.

Q Where were the policemen during the search, if you recall?

A They were in the living room area of the apartment ensuring that Mr. Griffin did not take any action against us during the search.

Q There's been reference made I believe to a lady by the name of Tanya Turner. Did you come into contact with a subject by the name of Tanya Turner?

A There was a young lady in the residence. I did not question her as to her name at the time.

Q During the search did she remain at the residence?

A For a short period. She requested that authority to leave. I had no authority over her. I gave her permission to leave.

Q Did you observe whether or not she left?

A She did leave.

Q During the course of your search did you find a .357 handgun pistol?

A I did.

Q And where did you find that?

A I found it in the living room area of the apartment in a small table, in a drawer in a small table.

Q Did you check to see whether or not it was loaded?

A I did.

Q And?

A It was not loaded.

Q Prior to leaving the apartment did you observe whether or not there were any bullets located near that weapon?

A Mrs. Johnson brought to my attention some rounds of ammunition that were located approximately to where I found the gun.

Q That was also inside Mr. Griffin's residence?

A Correct.

Q What, if anything, did you do with the handgun?

A I turned the handgun over to the detectives in order for them to secure it in preparation for an action that we would take against Mr. Griffin.

Q Was it Detective Leppla that you turned the gun to?

A I'm not sure. There were three detectives there.

Q During the course of your search after the gun was found, did you—well, strike that. I'll start again. After the gun was found, did you continue searching?

A Yes.

Q During the course of—after the gun was found while you were still continuing the search, did Mr. Grif-

fin make any requests of you? And I just ask you to answer yes or no.

A Yes, he did.

Q And did that request have anything to do with making a telephone call?

A Yes, it did.

Q And did you give him permission to make a telephone call?

A Yes, I did.

MR. HAYES: I have nothing further.

THE COURT: Cross-examination, Mr. Habermehl?

MR. HABERMEHL: Excuse me, your Honor. I have to ask Mr. Hayes a question.

THE COURT: Thank you.

(Mr. Habermehl confers with Mr. Hayes.)

CROSS-EXAMINATION BY MR. HABERMEHL:

Q Mr. Lew, you testified earlier about some records from Probation and Parole office.

A Yes.

Q Could you show me those ones that you just reviewed to refresh your recollection?

A The monthly report forms?

Q Correct. Now, I think you testified that it wasn't required to have knowledge of who Mr. Griffin was living with.

A In certain circumstances we make sure that the client tells us who he or she is living with or who they associate with. It is difficult if not impossible if the client doesn't offer that information to keep track of 680 people in the city and who they're living with.

Q Now, you're not Mr. Griffin's agent; are you?

A No, I'm not.

Q And Mr. Griffin wouldn't normally make reports to you; would he?

A No, he would not.

Q Did I understand you correctly to say that the earliest report you had in your possession showing Mr. Griffin living at 1021½ Central Street was from December 16th, 1982?

A No.

THE COURT: Just a minute now, counsel. He wouldn't know what you would understand him to say. Listen to the question you asked him. He wouldn't know what you understand.

BY MR. HABERMEHL:

Q What I heard you say was that the earliest report was December 16, 1982. Did I hear you incorrectly?

A What I said was that that was the earliest report I could find given my quick perusal.

Q Okay. If I were to direct you back to these records and ask you to peruse them a little more thoroughly, do you think you might find—never mind. Just look through and tell me after you've looked through all of them what the earliest report is showing that address.

A I was in error. The date had been changed. The earliest report appears to be 12-16-81.

Q And every report after 12-16-81, every one of those monthly reports shows the same address; right? 1021½ Central Street up to April of '83 at least?

A That's correct.

Q Can I see those again? I gather you have no reason to believe that the information in these reports is untrue?

A I have no reason to believe that.

Q I assume before April 5th, 1983, you had never asked Mr. Griffin if he was living with someone at that address?

A That's correct.

Q The Central Street address?

A That's correct.

Q Now, you say you took some police officers with you when you went to do this search; right?

A That's correct.

Q That's a matter of strict routine when you do that kind of search; isn't it?

A It is now.

Q When you got there Mr. Griffin didn't offer you any physical resistance to your search; did he?

A No.

Q He didn't even tell you not to search; did he?

A No.

Q He just stood by while you did what you wanted to do; right?

A Essentially.

Q This young woman in the residence, was she black or white?

A She was black.

Q Do you have any approximate idea of how old she was?

A My recollection is that she was in her 20's, but I can't be sure.

Q When you searched the residence, did you find evidence in the residence that a woman was living there as well as a man?

A Yes.

Q What kind of evidence to that effect?

A Clothing.

Q Personal effects?

A Correct.

Q Did you find these bullets?

A No, I did not.

Q Do you personally know of your own knowledge where the bullets were found other than what someone else may have told you?

A To the best of my recollection is that Ms. Johnson found them in the living room. I was in the living room at that time checking the weapon to make sure it was not loaded. I don't believe I actually saw her take it from a specific place.

Q So you didn't see with your own eyes where these so-called bullets came from?

A No.

Q In any event they certainly weren't in the gun when you found them?

A That's correct.

Q And I assume they weren't in the drawer with the gun, because you looked in the drawer; right?

A That's correct.

MR. HABERMEHL: I have nothing further.

THE COURT: Mr. Hayes, anything further?

REDIRECT EXAMINATION BY MR. HAYES:

Q You did see the bullets, though, you actually saw them?

A I did see the bullets.

MR. HAYES: I have nothing further.

THE COURT: Mr. Habermehl, anything further?

MR. HABERMEHL: No.

THE COURT: Thank you. You may step down. Is this witness excused?

MR. HAYES: Yes, your Honor.

THE COURT: Mr. Lew, you are excused and free to go or free to remain in the courtroom as you wish. Mr. Hayes, you may call your next witness.

MR. HAYES: I would call Joanne Johnson.

THE COURT: Joanne Johnson, would you please come to the witness stand. Before taking your seat, please raise your right hand. This Clerk will swear you as a witness.

JOANNE D. JOHNSON, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: Will you be seated. Please state your full name and spell your first and last name.

WITNESS: Joanne D. Johnson. J-o-a-n-n-e J-o-h-n-s-o-n.

THE COURT: Mr. Hayes, you may question the witness.

MR. HAYES: Thank you.

DIRECT EXAMINATION BY MR. HAYES:

Q Would you tell the jury where you're employed, Ms. Johnson?

A Bureau of Community Corrections, Probation and Parole.

Q And in what capacity?

A Probation and Parole Agent.

Q And how long have you worked there?

A Three years.

Q I'd like to direct your attention now to April 5th of 1983. Did you have—strike that. Were you just present in the courtroom to hear the testimony of Supervisor Michael Lew?

A Yes, I was.

Q Are you the Joanne Johnson he referred to that participated in the search of Mr. Griffin's residence?

A Yes, I am.

Q Do you know Joe Griffin?

A Yes, I do.

Q Do you see him in the courtroom now?

A Yes, I do.

Q Would you identify him, please?

A He's the man sitting directly in front of me with the white T-shirt.

THE COURT: Let the record show that this witness has identified the defendant, Joseph G. Griffin.

BY MR. HAYES:

Q During the course of that search did you have occasion to see the handgun testified to by Mr. Lew?

A Yes, I did.

Q During the—did you participate in the search testified to?

A Yes, I did.

Q During the course of that search did you have occasion to find any bullets that would fit that gun?

A Yes, I did.

Q And in relation to—well, do you know where the handgun was found by Mr. Lew?

A Yes, I do.

Q In relation to where the handgun was found where was it?

A On top of the table. There was a small bowl, and they were in that bowl. There was a bowl or vase.

Q Bowl? What, aquarium type bowl or what?

A No, about this big around.

THE COURT: Just a minute. Let the record show that the witness has indicated with her hands a circle approximately four inches across. Is that correct?

A Slightly bigger, you know, about like that.

THE COURT: About four to five inches across. She has described the bowl as being round and about that size

BY MR. HAYES:

Q And where was the gun found?

A In the table in the drawer.

Q Did you hear Mr. Lew testify concerning giving Mr. Griffin permission to make a telephone call?

A Yes, I did.

Q Did you observe whether or not Mr. Griffin made a phone call?

A Yes, I did.

Q When he made that phone call, where were you in relation to him?

A I was standing behind him, in the living room, in the living room.

Q Okay. Besides you and Mr. Griffin, were there any police officers in there if you recall?

A There were detectives there, yes.

Q Did you have occasion to hear at least a portion of what Mr. Griffin said into the phone? I'm just asking whether or not you heard it.

A Yes, I did.

MR. HAYES: Your Honor, I believe it's at this point that you would request—

THE COURT: Very well. I will excuse the jury to the juryroom.

(10:58 a.m. Jury is sent into the juryroom.)

THE COURT: Close it tight. And then you better find Mr. Gerhardt. Mr. Hayes?

MR. HAYES: Your Honor, maybe it would be best if I proceeded with an offer of proof so the Court knows exactly what we're talking about.

THE COURT: Very well. You may proceed.

MR. HAYES: Thank you.

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THE COURT: Mr. Lathrop, would you please come to the witness stand. Come right up the center aisle and walk around the Court Reporter and up to this witness stand. And before being seated, please raise your right hand. The Clerk to my left will swear you as a witness.

SAM W. LATHROP, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: You may be seated. Please state your full name and spell your first and last name.

WITNESS: Sam W. Lathrop. La-t-h-r-o-p.

THE COURT: Mr. Hayes, you may question this witness.

MR. HAYES: Thank you, your Honor.

DIRECT EXAMINATION BY MR. HAYES:

Q Officer Lathrop, where are you employed?

A The City of Beloit Police Department.

Q And in what capacity?

A I'm a police officer.

Q And how long have you been so employed?

A Approximately five and a half years.

Q I'd like now to direct your attention to April 5th of 1983. Were you so employed on that date?

A I was.

Q And at approximately 4 p.m. did you have an occasion to go to 1021½ Central in the City of Beloit, Rock County, Wisconsin?

A I did.

Q And can you tell the jury why you went there?

A Went there as a part of a security team accompanying probation officers who intended to do a search of that residence.

Q Did you arrive at 1021½ Central?

A Yes.

Q Did you enter?

A Yes.

Q And after entering, did you observe a subject that you now know to be Joe Griffin?

A Yes.

Q Do you see that subject in the courtroom now?

A Yes.

Q Would you identify him, please?

A He's sitting at the table in front of me, black male, with a white T-shirt.

THE COURT: Let the record show that this witness has identified the defendant, Joseph G. Griffin.

BY MR. HAYES:

Q Did you see a black female subject in the apartment?

A I did.

Q And do you see her in the courtroom now?

A I'm not sure. I don't recall. I recall that there was a black female there, but she was only there for a short period of time.

Q Was she tall, short?

A Approximately five foot-six in height, five foot-seven, and medium to thin build as best I can recall.

Q Okay. And how long was she present?

A I'd say approximately, while I was observing her, ten, fifteen minutes, ten minutes.

Q Did you while you were at that residence observe any handguns?

A Yes, I did.

Q Where was the handgun when you first observed it?

A It was in plain view in a cabinet that had a drawer in it, and the drawer was open approximately six to eight inches, and inside the drawer you could see in plain view there was a handgun there.

Q Did you observe what was on top of this what did you say? Table or cabinet?

A Yeah. It was in the corner of the living room, and it held a television on top and some other items on top of the television, and that set on top of the cabinet. That same cabinet had the drawer that the gun was in.

Q Did you see any bullets for that gun?

A Yes.

Q And where were they?

A They were in a bowl that sat on top of the television, a small bowl.

Q Do you know Mike Lew from Probation and Parole?

A Yes, I do.

Q Did you see him in possession of the gun that you've testified to?

A Yes.

Q Did you see what he did with that gun?

A I believe he gave it to Detective Leppla for security reasons.

Q While you were present did you observe Mr. Griffin make any phone calls?

A Yes.

Q And did you hear Mr. Griffin speak into the telephone?

A Yes.

Q What did you hear Mr. Griffin say?

A Well, I can't recall his precise words, but I can recall the general gist of the conversation.

Q And that was?

MR. HABERMEHL: I object. There's no foundation for personal knowledge. He said he doesn't recall.

THE COURT: The objection is overruled. I'll have the question read to you, and you may answer the question.

(Whereupon the previous question was read.)

A He was speaking on the telephone explaining that he had just been arrested as a result of him having the gun that was located in the cabinet.

MR. HAYES: I have nothing further, your Honor.

THE COURT: Cross-examination, counsel?

CROSS-EXAMINATION BY MR. HABERMEHL:

Q How far were you—how far away were you from Mr. Griffin when you say you heard this phone conversation?

A Approximately six feet.

Q His back was turned to you; wasn't it? Or don't you recall?

A I don't believe his back was turned to me.

Q And generally what you recall him saying was that he had been arrested for having a gun; right? The gun that was in the cabinet?

A Yes.

Q Did you take those bullets that were on top of the TV?

A No.

Q Did you take possession of the gun?

A No.

Q Did you ever even touch the gun?

A Later at the station I believe I examined it. I don't believe I had anything to do with it at the scene.

Q Are you aware of anyone having performed any tests on the gun to see if there were any fingerprints on it?

A I'm not aware of that.

Q Or the bullets?

A No.

Q Now, you made a report concerning this incident and your part in it, didn't you, a written police report?

A Yes.

Q Do you have that with you?

A No, I do not.

Q If I showed you a copy of it, would you recognize it?

A I'm sure I would.

Q I don't want you to read this out loud or anything, okay? I just want you to have it so when I ask you a question about it, you've got it in front of you.

A Okay.

Q Now, part of your training as a police officer is to write these reports; right?

MR. HAYES: Your Honor, just for the record could we have the officer establish that that is his report and how many pages it is?

MR. HABERMEHL: I haven't asked him anything about it yet.

THE COURT: Well, let's see. I think we should have it marked, whatever you've handed to him should be marked. And then we'll go on from there.

MR. HABERMEHL: Fine.

(Exhibit marked.)

BY MR. HABERMEHL:

Q Officer, showing you what's been marked as Defendant's Exhibit 1, do you recognize what that is?

A Yes, I do.

Q And what is that?

A It's a copy of the typed report that I dictated regarding this incident.

Q Do you have any reason to believe that's not an accurate copy?

A No.

Q Looks like a Xerox of it; right?

A That's correct.

Q Part of your training as a police officer is to write these reports; right?

A Yes, sir.

Q And you're trained to make them complete and as accurate as possible?

A Yes, sir.

Q And one of the reasons for that is that later on you might have to testify in court about what you saw and did in connection with the incident; right?

A That's correct.

Q And you use these reports to refresh your memory, 'cause often times testimony comes many months or maybe even years after the incident; right?

A That's correct.

Q And did you review this report before you testified today?

A Yes.

Q Okay. No place in that report is there any mention of hearing any statement from Mr. Griffin; is there?

A No.

Q You omitted that from your report; didn't you?

MR. HAYES: Your Honor, I'm going to object. It's repetitive.

THE COURT: Overruled. This is cross-examination. You may question the witness further at the proper time. You may proceed, counsel.

BY MR. HABERMEHL:

Q You omitted that from the report; didn't you?

A I would say that omitted is probably a poor term. The conversation isn't in the report.

Q You chose not to put it—you choose what goes into that report; don't you?

A Yes.

Q You dictate it and they type what you dictate?

A Right.

Q And you chose not to dictate anything into that report about overhearing this conversation; didn't you?

A I found it wasn't necessary.

Q I gather your answer to that question is "yes".

MR. HAYES: Your Honor, I'm going to object.

THE COURT: The objection is overruled. His answer will stand.

BY MR. HABERMEHL:

Q That was the question. I gather the answer to the question then is "yes", you chose not to put any remarks about that conversation into your report?

MR. HAYES: Your Honor, I'm going to object, because it's repetitive. And further, your Honor, I don't think that he has to answer the way Mr. Habermehl wants him to answer it. He can answer it as he understands the question.

THE COURT: The objection is overruled. Do you understand the question?

A Yes.

THE COURT: You may answer the question. Do you want it read to you?

A Yes, please.

(Whereupon the previous question was read.)

THE COURT: Well, I will have that question stricken. I don't know what you mean by, he wouldn't know what you gather. Why don't you rephrase the question.

BY MR. HABERMEHL:

Q You chose, Detective, not to put anything into your report regarding what you say you overheard Mr. Griffin say; isn't that true?

A You're making it sound like I had a choice as to whether or not I wanted to put it in, and that's—that wouldn't be accurate. It simply was not entered into my report as I found it not necessary to enter it.

Q Because it didn't seem important to you at the time?

A As you mentioned before, the reports are to refresh my memory. And I found that I would be able to recall that incident. And, yes, at the time I found, perhaps agreed, that it wasn't outstanding enough that I wanted to make record of it in my report.

Q And what in your report refreshed your memory about hearing this conversation?

MR. HAYES: Your Honor, I'm going to object. It assumes a fact not in evidence, that he had—could not have an independent memory of that without reading the report.

THE COURT: The objection is overruled. Read the question to the witness, and you may answer the question.

(Whereupon the previous question was read.)

A The report refreshed my memory about the entire incident. I remember things that happened that day that aren't written down on my report.

BY MR. HABERMEHL:

Q When is the first time you told the District Attorney about hearing this conversation?

A This morning.

MR. HABERMEHL: Nothing further.

THE COURT: Mr. Hayes, further questions?

REDIRECT EXAMINATION BY MR. HAYES:

Q In regard to your reports, Officer Lathrop, do you make a verbatim account of any transaction that you have as a police officer? Is your report a verbatim account?

A That would be almost impossible.

MR. HAYES: I have nothing further.

THE COURT: Mr. Habermehl, any further questions?

MR. HABERMEHL: No.

THE COURT: You may step down. Thank you. Is this witness excused?

MR. HAYES: Yes.

THE COURT: Officer, you are excused and free to go or free to remain in the courtroom as you wish. Mr. Hayes, you may call your next witness.

MR. HAYES: Thank you, your Honor. I would call Officer Leppla.

THE COURT: Officer Leppla, would you please come to the witness stand. Before being seated, please raise your hand. The Clerk will swear you as a witness.

GERALD A. LEPPLA, called as a witness herein, being first duly sworn, on oath, was examined and testified as follows:

CLERK: Please state your full name and spell your first and last name.

WITNESS: Gerald A. Leppla. L-e-p-p-l-a.

THE COURT: Mr. Hayes?

MR. HAYES: Thank you, your Honor.

DIRECT EXAMINATION BY MR. HAYES:

Q Officer Leppla, would you tell the jury where you're employed?

A City of Beloit Police Department.

Q And in what capacity?

A As a police officer.

Q How long have you been so employed?

A Ninteen years.

Q Has your employment been continuous?

A Yes, it has.

Q I'd like now to direct your attention to April 5th of 1983. Were you so employed on that date?

A Yes, I was.

Q Further directing your attention to approximately 4 p.m. that afternoon did you have occasion to go to 1021½ Central in the City of Beloit, Rock County, Wisconsin?

A Yes, I did.

Q And why did you go there?

A We were asked to assist as a security team as the probation and parole officers were going to conduct a search there.

Q Did you make entry into that residence?

A Yes, I did.

Q After making entry into the residence, did you come into contact with a subject that you now know as Joseph G. Griffin?

A Yes.

Q Do you see him in the courtroom now?

A Yes. He's sitting at the table in front of me with the white T-shirt.

THE COURT: Let the record show that this witness has identified the defendant, Joseph G. Griffin.

BY MR. HAYES:

Q During the—did you observe the probation and parole people making a search?

A Yes, I did.

Q Did you—was Mike Lew one of those people?

A Yes, he was.

Q Did you observe him with any type of handgun that he found at the premises?

A Yes.

Q And what happened to that handgun, if you know?

A For security reasons he turned it over to me.

Q And what did you do with it then?

A I took the possession of the weapon, took it to the police department, and it was tagged there and placed into a property evidence locker.

Q The handgun in question, the one that you put into the evidence locker, I asked you to bring with you today. Did you do that?

A Yes, I did.

Q May I see it, please? Now, it has a holster. Was it like that when you got it?

A Yes, it was.

(Exhibit marked.)

Q I marked the gun and holster as State's Exhibit Number 2 on this tag, Officer. So when I say I'm handing you now State's Exhibit Number 2, and I hand you those, you know what we're talking about.

A Yes.

Q I'm handing you now what's been marked as State's Exhibit Number 2, consists of two items. Would you identify both of these items for the jury?

A This is a Colt .357 revolver with a two-inch barrel. This is a brown leather holster that is fitted for a gun of this nature.

Q There's been reference made to the term Lawman III connected with the gun. What does that mean?

A It's a particular model.

Q Is this such a model?

A Yes, it is.

MR. HAYES: I have nothing further, Detective Leppla.

THE COURT: Cross-examination, Mr. Habermehl?

CROSS-EXAMINATION BY MR. HABERMEHL:

Q Detective, do you know Michael Lew?

A Yes.

Q He was there at the apartment on April 5th?

A Yes, he was.

Q And he gave you that gun?

A Yes, he did.

Q And the holster?

A Yes, they were combined.

Q He didn't give you any bullets, though; did he?

A No, Mike didn't.

Q To your knowledge has anyone tested that gun to see if there was any fingerprints on it?

A No.

Q You familiar enough with guns to have a reasonable idea of how much that gun is worth?

A About $200.

MR. HABERMEHL: Nothing further.

THE COURT: Anything further, Mr. Hayes?

MR. HAYES: Yes, your Honor.

REDIRECT EXAMINATION BY MR. HAYES:

Q By the time you got back to the police station, how many people had handled that gun, physically touched it with their hands, that you observed?

A Mike Lew and myself.

Q Okay. At the station Detective Lathrop handled it?

A Yes, he could have. I'm not sure.

Q Anyone else?

A Not to my knowledge.

MR. HAYES: Thank you. I have nothing further.

THE COURT: Anything further, Mr. Habermehl?

MR. HABERMEHL: Yes.

RECROSS-EXAMINATION BY MR. HABERMEHL:

Q Detective Leppla, Mike Lew picked the gun up out of the drawer and handed it to you; right?

A Yes.

Q And you put it into some kind of property bag?

A No, I just held onto it.

Q And you carried it back in your pocket back to the police department?

A Either that or I stuck it in my belt. I don't know exactly how I carried it.

Q At what point was this weapon assigned a property tag?

A At the police department.

Q And at that point it was placed into some kind of plastic baggie or something; wasn't it?

A Well, it wasn't necessary to put it into a plastic bag. I merely placed the tag that you see around the trigger guard and then placed it into a locker.

Q A locked locker I assume?

A Yes. Yes.

Q Isn't it normal police procedure when you take into custody a piece of evidence to bag it or secure it in some fashion?

A In some instances, yes, but not always.

Q That wasn't done with this gun then?

A No.

MR. HABERMEHL: Nothing further.

THE COURT: Anything further, Mr. Hayes?

MR. HAYES: No, your Honor.

THE COURT: Thank you. You may step down. Mr. Hayes, you may call your next witness.

MR. HAYES: Your Honor, at this time I would hand to the Court State's Exhibit Number 1, a certified copy of a Certificate of Conviction for Joseph G. Griffin for, showing February 8th, 1978, conviction for possession of heroin with intent to deliver. And I would ask the Court to take judicial knowledge or judicial notice of that case. And I believe the Court—I had requested that Mrs. Bussie, the Clerk of Courts, give the Court that case. And so I believe the Court has the case in front of it now.

THE COURT: Mr. Habermehl, first, do you have any objection to State's Exhibit 1, which is being offered?

MR. HABERMEHL: Yes, I do.

THE COURT: Have you seen that?

MR. HABERMEHL: I have seen it.

THE COURT: Do you want to address yourself to that in the absence of the jury?

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STATE OF WISCONSIN
CIRCUIT COURT, BRANCH 4
ROCK COUNTY

[Caption Omitted in Printing]

JURY VERDICT

We, the Jury, duly impaneled and sworn to try this issue, find the defendant, Joseph G. Griffin, guilty of intentionally and feloniously as a person who has been convicted of a felony in this state, subsequent to that conviction possessing a firearm, to-wit: a Colt .357 Magnum Lawman III, contrary to Section 941.29(2) of the Wisconsin Statutes, as alleged in Count One of the Information.

Dated this 18th day of August, 1983.

/s/ William B. Niemer
(Foreperson)

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH V
ROCK COUNTY

[Caption Omitted in Printing]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS—ILLEGAL ARREST AND MOTION TO SUPPRESS

The defendant having filed a Motion to Dismiss—Illegal Arrest and Motion to Suppress in the above-captioned action, both of said Motions being dated May 27, 1983, and the Court having taken testimony on said motions on July 15, 1983, the State appearing by Ms. Katharine Bucher, and defendant appearing in person and by counsel, Alan G. Habermehl, and the Court having held a further hearing on said motions on August 15, 1983, the State appearing by William Hayes, Esq. and defendant appearing in person, and with counsel, Alan G. Habermehl, and the Court having reviewed the testimony in this proceeding, having heard the arguments of counsel, and being advised in the premises, now, therefore

IT IS ORDERED that defendant's Motion to Dismiss —Illegal Arrest and Motion to Suppress be, and thereby are, DENIED.

Dated this 2nd day of September, 1983.

BY THE COURT:

/s/ J. Richard Long
HON. J. RICHARD LONG
Rock County Circuit
Court, Branch V

STATE OF WISCONSIN
CIRCUIT COURT BRANCH X 4
COUNTY ROCK

Court Case. No. 83-CR-1442

STATE OF WISCONSIN, PLAINTIFF

v.

JOSEPH G. GRIFFIN, DEFENDANT

AMENDED JUDGMENT OF CONVICTION SENTENCE TO WISCONSIN STATE PRISONS

Sept. 7, 1954 Defendant Date of Birth

The defendant entered his/her plea(s) of

☐ guilty ☒ not guilty ☐ no contest:

The ☐ Court ☒ Jury found the defendant guilty of:

Crime(s) Possession of firearm as convicted felon

Wis. Statute(s) Violated 941.29(2)

Felony or Misdemeanor (F or M) F

Date(s) Committed 4-5-83

committed in this County, and

On September 16, 1983, the Court inquired of the defendant why sentence should not be pronounced, and no sufficient grounds to the contrary being shown or appearing to the Court, the Court having accorded the district attorney, defense counsel, and the defendant an opportunity to address the Court regarding sentence; and upon

all the evidence, records and proceedings, the Court pronounced Judgment as follows:

IT IS ADJUDGED that the defendant is convicted as found guilty, and is sentenced to the Wisconsin State Prisons for an indeterminate term of not more than Two (2) Years.

IT IS ADJUDGED that 101 days sentence credit are due pursuant to Sec. 973.155, Wis. Stats.

IT IS ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff, and that the Sheriff shall forthwith deliver the defendant and a copy of this Judgment to the Dodge Correctional Institution (Reception Center) located in the City of Waupun, Wisconsin.

BY ORDER OF THE COURT:

Signature of Judge, Deputy or Clerk of Court

/s/ J. Richard Long

Name of Judge J. Richard Long

Date Signed 10-24-83

Name of Defense Attorney Alan R. Habermehl

Name of District Attorney William J. Hayes

COURT OF APPEALS OF WISCONSIN

No. 84-021CR

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT

v.

JOSEPH G. GRIFFIN, DEFENDANT-APPELLANT

Submitted on Briefs Nov. 9, 1984
Opinion Released Sept. 12, 1985
Opinion Filed Sept. 12, 1985
Review Granted

Before GARTZKE, P.J., and DYKMAN, J., and BRUCE F. BEILFUSS, Reserve Judge.

GARTZKE, Presiding Judge.

Joseph Griffin appeals from a judgment convicting him of possession of a firearm as a convicted felon. Sec. 941.29(2), Stats. Griffin was previously convicted of possession of heroin with intent to deliver, a felony, and was on probation for resisting arrest, disorderly conduct and obstructing an officer. Probation agents found a pistol in Griffin's apartment during a warrantless search. The trial court denied Griffin's motion to suppress the pistol as evidence.

Griffin contends that a warrant is constitutionally required to search a probationer's residence. Alternatively,

he argues that even without a warrant requirement the search was unlawful because it was not based upon probable cause, or, at a minimum, a reasonable belief that contraband was present. The state asserts that because Griffin was on probation, the warrantless search in accordance with the rules of the Department of Health and Social Services was constitutional. We conclude that probation agents could lawfully search Griffin's apartment without a warrant on information from the police that he had a gun in his apartment. We therefore affirm.

A probation supervisor testified at the suppression hearing that a detective in the Beloit police department telephoned him that the police had information that Griffin "may have had guns" in his apartment. The supervisor requested police protection for a search. Two or three hours later, the supervisor, a probation agent and three plainclothes police officers went to Griffin's apartment. When Griffin answered the door, they identified themselves and said they were going to search the residence. The police stayed in the living room with Griffin, his child and a woman living with him, while the supervisor and agent searched the apartment. After the supervisor returned to the living room, an officer pointed to a partially open table drawer, in which the supervisor found the pistol. The supervisor directed the officers to arrest Griffin.

The trial court found that the police were present to protect the probation agents at the latters' request and that a police search had not occurred. The court concluded that the warrantless search was reasonable because probation agents have a duty to determine whether a probationer is violating the law or the conditions of probation and because they relied on information from a detective that guns were or may be in Griffin's apartment. The trial court therefore refused to suppress the gun as evidence. Griffin was tried and convicted, and this appeal resulted.

1. *Warrantless Search by Probation Agents Permitted*

Griffin's motion to suppress is based on the fourth and fourteenth amendments to the United States Constitution [1] and Wis. Const. art. 1, sec. 11. The provisions of the fourth amendment to the United States Constitution and Wis. Const. art. I, sec. 11, prohibit unreasonable search and seizure and are almost identical. Evidence obtained in violation of either provision is generally inadmissible and must be suppressed.

The chief evil against which the fourth amendment is directed is the physical entry of the home. *Welsh v. Wisconsin*, 466 U.S. 740, ——, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732. 742 (1984).

> And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. *See Johnson v. United States*, 333 U.S. 10, 13-14 [68 S.Ct. 367, 368-69, 92 L.Ed. 436] (1948). It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. [573,], 586 [100 S.Ct. 1371, 1380, 63 L.Ed.2d 639] [1980]. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 [91 S.Ct. 2022, 2042, 29 L.Ed.2d 564] (1971). . . .

Welsh, 466 U.S. at ——, 104 S.Ct. at 2097, 80 L.Ed.2d at 742 (footnote omitted).

Exceptions to the warrant requirement are "few in number and carefully delineated," *United States v.*

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[1] The provisions of the fourth amendment apply to the states through the Due Process Clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

United States District Court, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972), and have been "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958). The exceptions recognized by the United States Supreme Court include search based on consent, search incident to a lawful arrest, a search in hot pursuit, exigent circumstances and seizure of evidence in plain view. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) (consent); *Michigan v. Long*, 463 U.S. 1032, 1048, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201, 1219 (1983) (limited search incident to lawful arrest); *Texas v. Brown*, 460 U.S. 730, 735-36, 103 S.Ct. 1535, 1539-40, 75 L.Ed.2d 502 (1983) (hot pursuit); *New York v. Belton*, 453 U.S. 454, 457, 101 S.Ct. 2860, 2862, 69 L.Ed.2d 768 (1981) (exigent circumstances); and *Washington v. Crisman*, 455 U.S. 1, 5-6, 102 S.Ct. 812, 815-16, 70 L.Ed.2d 778 (1982) (plain view). The state makes no claim that any of these exceptions applies to the facts before us.

The United States Supreme Court has not declared whether the status of a probationer or parolee is a basis for an additional exception to the warrant requirement.[2] This, of course, need not deter us from deciding whether the exception exists. *See State v. Prober*, 98 Wis.2d 345, 360-61, 297 N.W.2d 1, 9 (1980) (medical emergency exception exists for warrantless search of home, notwithstanding lack of United States Supreme Court precedent). The existence and circumstances of such an exception have been the subject of considerable discussion

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[2] The cases indicate that probation and parole are the same or fail to distinguish between them for purposes of deciding whether a warrantless search of a dwelling is constitutional. *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 265-66 (9th Cir. 1975); *State v. Malone*, 403 So.2d 1234, 1238 (La. 1981); *Seim v. State*, 95 Nev. 89, 590 P.2d 1152, 1154 (1979); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088, 1091 (1973).

at other levels. *See* 3 W. LaFave, *Search and Seizure* sec. 10.10, at 421 (1978). LaFave concludes:

> Although there is some authority to the effect that the Fourth Amendment rights of probationers and parolees are of precisely the same scope and dimension as those of the public at large, the weight of authority is to the contrary. . . . And while there is some disagreement as to whether a probationer's Fourth Amendment rights are diminished to the same extent and degree as those of a parolee, there is considerable authority supporting the proposition that probationers may lawfully be subjected to searches which, absent their probation status, would be deemed unlawful because of the absence of probable cause or a search warrant or both.

Id. at 421-22 (footnotes omitted).

Most state and federal courts faced with the issue have held that probation or parole agents may conduct a warrantless search of the dwelling of a probationer or a parolee. *See, e.g., Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975); *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982); *Roman v. State*, 570 P.2d 1235, 1242 (Alaska 1977) (dicta); *State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329, 1330 (1977); *People v. Mason*, 5 Cal.3d 759, 97 Cal.Rptr. 302, 306, 488 P.2d 630, 634 (1971), *cert. denied*, 405 U.S. 1016, 92 S.Ct. 1289, 31 L.Ed.2d 478 (1972); *People v. Anderson*, 189 Colo. 34, 536 P.2d 302, 305 (1975); *Grubbs v. State*, 373 So.2d 905, 907 (Fla. 1979) (use of evidence obtained limited to probation or parole revocation proceeding); *State v. Fields*, 686 P.2d 1379, 1389 (Hawaii 1984); *State v. Malone*, 403 So.2d 1234, 1239 (La. 1981) (yard); *People v. Richards*, 76 Mich.App. 665, 256 N.W.2d 793, 795 (1977); *State v. Earnest*, 293 N.W.2d 365, 369 (Minn. 1980) (evidence obtained used in a probation revocation proceeding); *State v. Morgan*,

206 Neb. 818, 295 N.W.2d 285, 289 (1980); *Himmage v. State*, 88 Nev. 296, 496 P.2d 763, 766 (1972); *People v. Huntley*, 43 N.Y.2d 175, 401 N.Y.S.2d 31, 34, 371 N.E.2d 794, 796 (1977); *State v. Perbix*, 331 N.W.2d 14, 21 (N.D. 1983); *State v. Culbertson*, 29 Or. App. 363, 563 P.2d 1224, 1229 (1977) (dicta); *State v. Cummings*, 262 N.W.2d 56, 61 (S.D. 1978); *State v. Velasquez*, 672 P.2d 1254, 1260 (Utah 1983); *State v. Simms*, 10 Wash.App. 75, 516 P.2d 1088, 1094 (1973).

Some courts permits police to make a warrantless search of a probationer's or parolee's dwelling. *See, e.g., Owens v. Kelley*, 681 F.2d at 1368; *State v. Montgomery*, 566 P.2d at 1331; *People v. Mason*, 488 P.2d at 631; *People v. Richards*, 256 N.W.2d at 795; *State v. Morgan*, 295 N.W.2d at 289; *Seim v. State*, 95 Nev. 89, 590 P.2d 1152, 1155 (1979) (dicta); *State v. Perbix*, 331 N.W.2d at 21. *Contra, e.g., U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir. 1975) (en banc); *Roman v. State*, 570 P.2d at 1243; *People v. Anderson*, 536 P.2d at 305; *Grubbs v. State*, 373 So.2d at 909; *State v. Fields*, 686 P.2d at 1388; *State v. Velasquez*, 672 P.2d at 1262.

Under the minority view, no exception to the warrant requirement applies to probationers or parolees, and a warrantless search may not be made of such a person's dwelling unless one of the judicially recognized exceptions is met. *See, e.g., U.S. v. Rea*, 678 F.2d 382, 387-88 (2d Cir. 1982); *U.S. v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978); *State v. Cullison*, 173 N.W.2d 533, 537 (Iowa), *cert. denied*, 398 U.S. 938, 90 S.Ct. 1841, 26 L.Ed.2d 270 (1970); *State v. Fogarty*, 187 Mont. 393, 610 P.2d 140, 144 (1980); *Tamez v. State*, 534 S.W.2d 686, 692 (Ct. App. Tex. 1976).

The Wisconsin Supreme Court recognizes an exception to the warrant requirement which allows probation agents to search or seize a probationer, provided that the search or seizure itself is reasonable. *State v. Tarrell*, 74 Wis.2d 647, 654-55, 247 N.W.2d 696, 701 (1976). The *Tarrell* court reasoned as follows:

> If there is to be an exception to the requirements of the fourth amendment granting probation agents a limited right to search or seize a probationer without a warrant, the foundation for this exception lies in the nature of probation itself. Probation, like parole, "is an integral part of the criminal justice system and has as its object the rehabilitation of those convicted of crime and the protection of the state and community interest." *State ex rel. Niederer v. Cady*, 72 Wis.2d 311, 322, 240 N.W.2d 626, 633 (1976). While probation is a privilege, not a matter of right, once it has been granted this conditional liberty can be forfeited only by breaching the conditions of probation. A sentencing judge may impose conditions which appear to be reasonable and appropriate. Sec. 973.09, Stats. A sentence of probation places the probationer "in the custody of the department" subject to the conditions of probation and rules and regulations of the Department of Health & Social Services. Sec. 973.10. All conditions, rules and regulations must be imposed with the dual goal of rehabilitation of the probationer and protection of the public interest. The imposition of these conditions, rules and regulations demonstrates that while a probationer has a conditional liberty, this liberty is neither as broad nor as free from limitations as that of persons who have not committed a crime. The expectations of privacy of a person on probation cannot be the same as the expectations of privacy of persons not on probation. It is only the reasonable expectations of privacy which the fourth amendment protects. Conditions of probation must at times limit the constitutional freedoms of the probationer. Necessary infringements on these freedoms are permissible as long as they are not overly broad and are reasonably related to the person's rehabilitation. By the very nature of probation, limitations on the liberty and privacy of probationers are imposed. These limitations are

the bases for an exception to the warrant requirement of the fourth amendment.

Id. at 653-54, 247 N.W.2d at 700-701 (footnotes omitted).

Tarrell involved a personal search and seizure of a probationer, not the warrantless search of a probationer's dwelling. Special considerations attend a home which do not apply to a search or seizure conducted elsewhere. "Cases involving searches for articles of personal property make clear that, under the fourth amendment, one's home is entitled to special dignity and sanctity." *Laasch v. State*, 84 Wis.2d 587, 594, 267 N.W.2d 278, 282 (1978). Sanctity attends the home. *Welsh v. Wisconsin*, 466 U.S. at ——, 104 S.Ct. at 2097, 80 L.Ed.2d at 743; *Payton v. New York*, 445 U.S. at 588-89, 100 S.Ct. at 1381. *Tarrell* is not authority for the proposition that probation agents may search a probationer's home without a warrant, in the absence of other circumstances which would permit the intrusion.

The *Tarrell* opinion leads us to conclude, however, that a warrantless search of a probationer's dwelling is permissible. The *Tarrell* court employed the reasoning of two lead opinions on the point: *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975), and *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975). *Tarrell*, 74 Wis.2d at 652 n.1 (citing *Consuelo-Gonzalez*), 655 n.5 (citing *Latta*), 247 N.W.2d at 700-01. The *Latta* court recognized that parolees possess fourth amendment protections but concluded that the relationship between the parole officer and the parolee precludes deciding the propriety of a warrantless search by automatic reference to the law of ordinary search and seizure. 521 F.2d at 250-51. The court held that a parole officer need not obtain a warrant before making an otherwise reasonable search of a parolee's dwelling. *Id.* In *U.S. v. Consuelo-Gonzalez*, *supra*, the court applied the same rationale to the warrantless search of a probationer's dwelling, emphasizing

the dual goals of probation: rehabilitation of a convicted person and protection of the public. 521 F.2d at 264-68.[3, 4]

We reject Griffin's argument that because innocent third persons were in his apartment, a warrant was necessary. Only one court, *State v. Fogarty*, 610 P.2d at 152, has so held. A second court, *State v. Velasquez*, 672 P.2d at 1260 n.3, has said in dictum that caution would suggest that a warrant be obtained under those

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[3] The *Consuelo-Gonzalez* court invalidated a warrantless search for contraband by law enforcement officers under the Federal Probation Act, 18 U.S.C. sec. 3651. The court reiterated the *Latta* holding that a probation officer could have conducted a warrantless search of the defendant's dwelling and expressed no opinion regarding the extent to which a state may constitutionally allow a warrantless search by police of a probationer's residence. 521 F.2d at 266.

[4] By statute, a probationer is "in the custody of the department" of health and social services and subject to its control "under the conditions set by the court of rules and regulations established by the department." Some courts rely on constructive custody, waiver or consent to justify warrantless searches of probationers' and parolees' dwellings. *See, e.g., People v. Mason*, 488 P.2d at 634 (waiver of fourth amendment rights); *People v. Hernandez*, 229 Cal.App.2d 143, 40 Cal.Rptr. 100, 103-04 (1964), *cert. denied*, 381 U.S. 953, 85 S.Ct. 1810, 14 L.Ed.2d 725 (1965) (constructive custody); *People v. Richards*, 256 N.W.2d at 795 (consent). The reasoning in *State v. Tarrell*, that probationers have a reduced expectation of privacy based on the nature of probation itself, has been described as a "balancing theory." *See* 3 W. LaFave, *Search and Seizure* sec. 10.10(c), at 431 (1978), 1 W. Ringel, *Searches and Seizures, Arrests and Confessions* sec. 17.3, at 17-10 (1984). We think the trend is toward the balancing theory. Sec. 973.-10(1), Stats. *See, e.g., Latta v. Fitzharris*, 521 F.2d at 249 (purposes of parole system justify invasion of privacy); *Owens v. Kelley*, 681 F.2d at 1367 (rehabilitation of probationer and protection of society); *Roman v. State*, 570 P.2d at 1242 n. 20 (rehabilitation and protection); *State v. Fields*, 686 P.2d at 1390 (probation presupposes a partial surrender of privacy); *State v. Earnest*, 293 N.W.2d at 368 (special relationship between probation officer and probationer); *State v. Simms*, 516 P.2d at 1094 (parolee's status and rehabilitative role of probation).

circumstances. In our view, because any search, with or without a warrant, can affect innocent third persons, no reason exists to require a warrant to protect the rights of those persons. *See People v. Mason*, 488 P.2d at 634.

We conclude that probation officers may conduct a warrantless search of a probationer's dwelling, notwithstanding failure of the search to meet one of the usual exceptions to the warrant requirement, provided that the search is otherwise reasonable.

Griffin contends that the warrantless search of his apartment must be deemed to have been made by the police rather than probation agents. He treats the issue as one of law. He asserts that his conclusion is compelled because the police had foreknowledge of, acquiesced in, and, in his view, actively participated in the search, and because the state seeks to use the evidence seized in a criminal prosecution. We reject his contention.

The trial court found that this was not a police search. That finding is tantamount to a factual inference from the established facts. The inference is that the search was made as part of the probation process rather than for law enforcement purposes. Treated as a factual inference, it is reasonable. We must accept the trial court's reasonable factual inferences from the established facts. *C.R. v. American Standard Ins. Co.*, 113 Wis.2d 12, 15, 334 N.W.2d 121, 123 (Ct. App. 1983).

Other courts have held that the police may accompany a parole officer when a search is made. *People v. Anderson*, 536 P.2d at 305. As long as the predominant purpose is to determine whether probation has been violated, the search is valid. *Seim v. State*, 590 P.2d at 1155-56. The *Latta* court sustained a search by a parole officer accompanied by police, where the parole officer was not a "stalking horse" for the police. 521 F.2d at 247. The *Consuelo-Gonzalez* court recognized that a proper visitation by a probation officer did not cease to be so because he is accompanied by a law enforcement official unless the cooperation is a subterfuge for criminal investigation. 521 F.2d at 267. *Compare Roman v. State*, 570 P.2d at 1243 (right to search is limited to parole officers but includes peace officers acting under their direction); *State v. Turner*, 142 Ariz. 138, 688 P.2d 1030, 1035 (Ct. App. 1984) (search not invalid because of police assistance); *State v. Howard*, 79 Cal. App. 3d 46, 143 Cal. Rptr. 342, 343 (1978) (police search at request of probation officer valid); *State v. Simms*, 516 P.2d at 1095 (parole officer may enlist aid of police officer in performing his duty); *Sanderson v. State*, 649 P.2d 677, 679 (Wyo. 1982) (police search at probation officer's request held part of probation process).

Nor is a warrantless search by a probation agent invalidated because the evidence seized is used in a criminal prosecution. "To hold that evidence obtained by a parole officer in the course of carrying out this duty cannot be utilized in a subsequent prosecution because evidence obtained directly by the police in such a manner would be excluded, would unduly immunize parolees from conviction." *United States ex rel. Santos v. New York State Bd. of Par.*, 441 F.2d 1216, 1218 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025, 92 S.Ct. 692, 30 L.Ed.2d 676 (1972). *See also, Latta v. Fitzharris*, 521 F.2d at 252-53 (evidence seized in valid search by parole officer may be used in criminal prosecution); *People v. Anderson*, 536 P.2d at 305 (evidence is admissible in the prosecution of another crime); *State v. Perbix*, 331 N.W.2d at 22 (evidence seized in valid search for probation violation may be used in new criminal prosecution); *State v. Velasquez*, 672 P.2d at 1262-63 (that evidence seized is beneficial to police or is used in criminal prosecution does not invalidate warrantless search of parolee's apartment).

2. *Grounds for Warrantless Search of Probationer's Dwelling—Compliance with Departmental Rules*

The supervisor testified that the search was conducted under rules adopted by the Department of Health and

Social Services. The pertinent rule is Wis. Adm. Code sec. HSS 328.21(4), which permits probation agents to search a probationer's ilving quarters "if there are reasonable grounds to believe that the quarters . . . contain contraband." [5] Contraband includes any item whose pos-

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[5] HSS 328.21 Search and seizure. (1) A search of a client, client's living quarters, or property may be made at any time, but only in accordance with this section.

. . . .

(4) A search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters of the property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances require search without approval.

(a) There shall be a written record of all searches of a client's living quarters or property. This record shall be prepared by the staff member who conducted the search and shall be filed with the agent's supervisor. If the search was conducted without the supervisor's approval because of exigent circumstances, a report stating what the exigent circumstances were shall be part of the record and shall be filed with the supervisor within 48 hours of the search. The report shall state:

1. The identity of the client whose living quarters or property was searched;
2. The identity of the staff member who conducted the search and the supervisor, if any, who approved it;
3. The date, time, and place of the search;
4. The reason for conducting the search. If the search was a random one, the report shall so state;
5. Any items seized pursuant to the search; and
6. Whether any damage was done to the premises or property during the search.

(b) If any items are damaged pursuant to the search of a client's living quarters or property, the client shall be informed in writing what those items are.

(c) In conducting searches, field staff shall disturb the effects of the client as little as possible, consistent with thoroughness.

(d) During searches, staff shall not read any legal materials, communication between the client and an attorney, or any

session is forbidden by law. Wis. Adm. Code sec. HSS 328.16(1)(b). It is generally unlawful for a convicted felon to possess a firearm. Sec. 941.29(2), Stats.

An administrative agency is bound by its regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959). Consequently, the search cannot be valid unless the probation agents had "rea-

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materials prepared in anticipation of a lawsuit. This does not include business records.

(e) If the client whose living quarters or property is being searched is not present, the agent may not forcibly enter the premises. A search should normally be conducted in the presence of another person.

(5) Field staff shall strive to preserve the dignity of clients in all searches conducted under this section.

(6) Whenever feasible, before a search is conducted under this section, the client shall be informed that a search is about to occur, the nature of the search, and the place where the search is to occur.

(7) In deciding whether there are reasonable grounds to believe a client possesses contraband, or a client's living quarters or property contain contraband, a staff member should consider:

(a) The observations of a staff member;
(b) Information provided by an informant;
(c) The reliability of the information relied on; in evaluating reliability, attention should be given to whether the information is detailed and consistent and whether it is corroborated;
(d) The reliability of an informant; in evaluating reliability, attention should be given to whether the informant has supplied reliable information in the past, and whether the informant has reason to supply inaccurate information;
(e) The activity of the client that relates to whether the client might possess contraband;
(f) Information provided by the client which is relevant to whether the client possesses contraband;
(g) The experience of a staff member with that client or in a similar circumstance;
(h) Prior seizures of contraband from the client; and
(i) The need to verify compliance with rules of supervision and state and federal law.

sonable grounds to believe" that Griffin's apartment contained contraband. Wis. Adm. Code sec. HSS 328.21(4). Only if this standard is met need we examine whether the search is otherwise reasonable.

In the law of arrest, reasonable grounds is equated with probable cause. *State v. Drogsvold*, 104 Wis.2d 247, 255, 311 N.W.2d 243, 247 (Ct. App. 1981). That is not the meaning of the standard in Wis. Adm. Code sec. HSS 328.21(4). The Note to HSS 328.21 states:

> Although it is preferable to have searches and seizure conducted by law enforcement authorities, that may not always be feasible or advisable, and it is deemed important to give field staff the authority to conduct reasonable searches at reasonable times. Experience teaches that these searches may be necessary because contraband, including drugs and weapons, may be discovered during these searches. These searches are thought to deter the possession of contraband.

The contrast in the Note between police searches and staff searches shows that the reasonable grounds standard in HSS 328.21 is less than probable cause.

If, as here, the historical facts are undisputed or have been established, whether the agents had reasonable grounds to believe that Griffin's apartment contained contraband is a question of law. *Compare State v. Drogsvold*, 104 Wis.2d at 262, 311 N.W.2d at 250 (probable cause for arrest is a question of law if historical facts are undisputed). We decide questions of law without deference to the trial court's conclusion.

Griffin contends that the probation supervisor lacked reasonable cause because he testified at the evidentiary hearing that an unnamed police officer had said that defendant "may have had guns" in his residence. To rely on that indefinite statement is unreasonable in Griffin's view.

The trial record shows that the supervisor had definite information that Griffin had a gun in his apartment. When reviewing an order on a motion to suppress evidence, an appellate court may take into account the evidence at the trial, as well as the evidence at the suppression hearing. *Carroll v. U.S.*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925); *U.S. v. Canieso*, 470 F.2d 1224, 1226 (2d Cir. 1972); *U.S. v. Pearson*, 448 F.2d 1207, 1210 (5th Cir. 1971); *Rocha v. U.S.*, 387 F.2d 1019, 1021 (9th Cir. 1967), *cert. denied*, 390 U.S. 1004, 88 S.Ct. 1247, 20 L.Ed.2d 104 (1968); *U.S. v. Smith*, 527 F.2d 692, 694 (10th Cir. 1975). At the trial, the supervisor testified that the detective who called him said "they had information that Mr. Griffin had [a gun] in his possession at his residence."

Griffin argues that to have reasonable cause, the supervisor needed more than the detective's statement that a gun was in Griffin's apartment. He asserts that we should apply the "totality of circumstances" analysis in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Our state supreme court used that test when determining whether a reasonable person would have believed that an emergency existed which created a need for aid. *State v. Boggess*, 115 Wis.2d 443, 455, 340 N.W.2d 516, 523 (1983).

We will not apply the "totality of circumstances" analysis created in *Illinois v. Gates*, *supra*. That analysis is used to determine whether a magistrate may conclude that probable cause exists to issue a warrant. We deal with the lesser standard of reasonable cause for a warrantless entry. The *Boggess* court dealt with a warrantless entry by a social worker and police officers for the safety and welfare of children. We deal with entry of the home of a person who is not entitled to the protection of a warrant and with a search required by the needs of probation.

Wisconsin Adm.Code sec. HSS 328.21(7) directs that a probation agent consider "[t]he need to verify compliance with rules of supervision and state and federal law" when

determining whether reasonable grounds exist to believe that a client's living quarters contain contraband. That need is extremely high when the agent believes that a firearm is in a probationer's home. As stated in the Note to sec. HSS 328.21:

> Contraband, particularly weapons, may be used to threaten, injure, or kill another. That weapons be kept out of the hands of clients is critical for the safety of others. Contraband must also be kept out of the hands of clients so they may be better able to participate in jobs, schooling or training, and other programs effectively.

We hold that a probation officer has reasonable grounds to believe that a probationer's living quarters contain contraband when told by the police that the quarters contain a gun. The search therefore met the requirements of the administrative regulation under which it was conducted, Wis.Adm.Code sec. HSS 328.21(4).

3. *"Reasonable Grounds to Believe" Sufficient for Warrantless Search*

Other courts which permit a warrantless search of a probationer's dwelling also hold that the search may be constitutionally made on less than probable cause to believe that a probation violation has occurred. Those courts variously describe the appropriate standard. *See, e.g., Latta v. Fitzharris*, 521 F.2d at 250 (reasonable belief that search is necessary but parole officer's "hunch" said to be sufficient); *People v. Anderson*, 536 P.2d at 305 (reasonable grounds); *State v. Fields*, 686 P.2d at 1390 (reasonable suspicion supportable by specific and articulable facts); *State v. Malone*, 403 So.2d at 1239 (reasonable suspicion); *State v. Williams*, 486 S.W.2d 468, 473 (Mo.1972) (sufficient information to arouse suspicion); *State v. Culbertson*, 563 P.2d at 1229 (minimal information or even spot checking as dictated by experience); *State v. Velasquez*, 672 P.2d at 1260 (reasonable suspicion); *State v. Simms*, 516 P.2d at 1096 (well-founded suspicion).

Some courts allow a warrantless search of a probationer's dwelling even if no grounds exist to believe that a probation violation has occurred. The eleventh circuit finds no constitutional requirement even of reasonable suspicion, if the search is performed in a reasonable manner. *Owens v. Kelley*, 681 F.2d at 1368-69. *See also People v. Mason*, 488 P.2d at 634 (probationer held to have consented to condition permitting searches whenever requested by police officers); *State v. Morgan*, 295 N.W.2d at 286 (condition authorizing search "with or without probable cause" held valid); *State v. Perbix*, 331 N.W.2d at 21 (searches permitted without reasonable suspicion).

The "reasonable grounds to believe" standard in Wis. Adm.Code sec. HSS 328.21(4) is, however, the minimum we should consider. It binds probation agents in this state. Because the Department of Health and Social Services must abide by its own regulations, we need not decide whether a lesser standard is acceptable.

The many decisions we have already cited show that a "reasonable" standard or one comparable to it has been held to be constitutionally acceptable. The reasonable standard adopted by the department should adequately protect probationer from intrusions of their dwellings without grounds and from harassment by probation agents. We approve it.

4. *Reasonableness of Search Itself*

The time, manner and scope of the search are not challenged on appeal and we therefore do not reach the reasonableness of the search itself. Any warrantless search conducted in furtherance of the purposes of probation must, of course, be carried out in reasonable manner, *Owens v. Kelley*, 681 F.2d at 1368-69; *Latta v. Fitzharris*, 521 F.2d at 252.

Because we conclude that the search was valid under the fourth amendment, we affirm the judgment appealed from.

Judgment affirmed.

DYKMAN, Judge (dissenting).

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment does not contain an escape clause for warrantless searches of probationers' homes, nor does it suggest that the term "probable cause" may be interpreted to mean "hunch" or "guess." There is no constitutional language suggesting a difference between parole officers and police.[1] The prohibition is against un-

[1] The majority finds it significant that a parole officer rather than a police officer searched defendant's residence. This distinction is not relevant to a fourth amendment analysis. In *New Jersey v. T.L.O.*, —— U.S. ——, ——, 105 S.Ct. 733, 740, 83 L.Ed.2d 720, 730 (1985), the court said:

> It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. *See United States v. Chadwick*, 433 U.S. 1, 7-8, 53 L.Ed.2d 538, 97 S.Ct. 2476 [2481] (1977); *Boyd v. United States*, 116 U.S. 616, 624-629, 29 L.Ed. 746, 6 S.Ct. 524 [528-31] (1886). [T]his Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L.Ed. 1048, 41 S.Ct. 574 [576], 13 A.L.R. 1159 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, *see Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L.Ed.2d 930, 87 S.Ct. 1727 [1730] (1967),

reasonable searches, and a prescribed quantum of evidence is required for the search.

The United States Supreme Court has recently said:

> It is axiomatic that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." And a principal protection against unnecessary instrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable."
>
> Consistently with these long-recognized principles, the Court decided in *Payton v. New York*, *supra*, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. [Citations and footnotes omitted.]

Welsh v. Wisconsin, 466 U.S. 740, ——-——, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732, 742-43 (1984).

Welsh was an "exigent circumstances" not a "probable cause" case. Still, the court quoted *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-69, 92 L.Ed.

OSHA inspectors, *see Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-313, 56 L.Ed.2d 305, 98 S.Ct. 1816 [1820] (1978), and even firemen entering privately owned premises to battle a fire, *see Michigan v. Tyler*, 436 U.S. 499, 506, 56 L.Ed.2d 486, 98 S.Ct. 1942 [1948] (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court, supra*, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 387 U.S., at 528, 18 L.Ed.2d 930, 87 S.Ct. 1727.

436 (1948), for the rule that forcible entry into homes may be made only with a search warrant:

> In *Johnson*, Justice Jackson eloquently explained the warrant requirement in the context of a home search:
>
> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Welsh at —— n. 10, 104 S.Ct. at 2097 n. 10, 80 L.Ed.2d at 742 n. 10.

In *Thompson v. Louisiana*, —— U.S. ——, ——, 105 S.Ct. 409, 410, 83 L.Ed.2d 246, 250 (1984), *reh'g denied*, —— U.S. ——, 105 S.Ct. 981, 83 L.Ed.2d 983 (1985) the court reiterated the warrant requirement, and listed the exceptions to that requirement:

> In a long line of cases, this Court has stressed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 [514] (1967) (footnotes omitted). This was not a principle freshly coined for the occasion in *Katz*, but rather represented this Court's long-standing understanding of the relationship between the two clauses of the Fourth Amendment. See *Katz*, *supra* [389 U.S.], at 357 n. 18 and 19, 19 L.Ed.2d 576, 88 S.Ct. 507 [514 n. 18]. Since the time of *Katz*, this Court has recognized the existence of additional exceptions. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 69 L.Ed.2d 262, 101 S.Ct. 2534 (1981); *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976); *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976). However, we have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the "persons, houses, papers and effects" of the citizen. [Footnote omitted.]

In *New Jersey v. T.L.O.*, —— U.S. ——, ——, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), the court also recognized a "school setting" exception to the fourth amendment's warrant requirement.

None of the exceptions listed in *Thompson* and *T.L.O.* suggest that the majority's exception for probationers exists. The Supreme Court refers to "a few specifically established and well delineated exceptions." *Thompson*, *supra*, —— U.S. at ——, 105 S.Ct. at 410, 83 L.Ed.2d at 250. If exceptions must be specifically established and well delineated, a state court of appeals statement that the lack of a "probationer" exception need not deter it from creating one is difficult to accept. Given the Supreme Court's forceful language concerning exceptions in fourth amendment cases, I would leave it to that court to determine whether a "probationer" exception exists.

Even accepting the majority's conclusion that a warrantless search of a probationer's dwelling may be made

with reasonable grounds to believe the dwelling contains contraband, those grounds do not exist in this case.

The facts surrounding the search are more extensive than the majority suggests. The probation officer testified that he could not recall which police officer told him of the existence or possible existence of defendant's gun, though he thought it was Officer Pittner. Officer Pittner did not recall telling the probation officer that defendant possessed a gun.

We cannot tell whether the unknown police officer told the probation officer that defendant had a gun or possibly had a gun—the probation officer testified to both. We cannot tell whether the unknown police officer's belief was founded on a hunch, informant information, rumor or imagination. Without knowing where information comes from, no one can form a conclusion, let alone a reasonable conclusion, that the information meets the "reasonable grounds to believe" standard adopted by the majority. In reality, the majority's standard is merely whether a possibility exists that a probationer possesses a gun. This amounts to license for police to break into any probationer's home at any time for any or no reason.

Probationers may achieve their status as a result of convictions for disorderly conduct, drunk driving, or fish and game law violations, as well as by being convicted of a major felony. Making all probationers' homes subject to forcible searches by the police for little if any reason results in the very evil the fourth amendment was designed to prevent. Probationers' guns and drugs are readily seized through the use of warrants or existing warrant exceptions. We do not need the one adopted by the majority.

SUPREME COURT OF WISCONSIN

No. 84-021-CR

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT

v.

JOSEPH G. GRIFFIN, DEFENDANT-APPELLANT-PETITIONER

Argued June 4, 1986

Opinion Filed June 20, 1986

DAY, Justice.

This is a review of a published decision of the court of appeals, *State v. Griffin*, 126 Wis.2d 183, 376 N.W.2d 62 (Ct.App. 1985), affirming the judgment of the circuit court for Rock county, Honorable J. Richard Long, circuit judge, convicting Joseph G. Griffin, (Defendant) of possession of a firearm by a convicted felon contrary to Section 941.29(2), Stats.[1] Defendant was previously convicted of possession of heroin with intent to deliver which is a felony. A probation agent dis-

[1] Section 941.29(1) and (2), Stats., provides in part:

"941.29 Possession of a firearm. (1) A person is subject to the requirements and penalties of this section if he or she has been:

"(a) Convicted of a felony in this state . . . .

"(2) Any person specified in sub. (1) who, subsequent to the conviction for the felony or other crime, as specified in sub. (1), . . . possesses a firearm is guilty of a Class E felony."

covered a gun at the Defendant's residence during a warrantless search. At the time of the search, Defendant was on probation for resisting arrest, disorderly conduct and obstructing an officer. The trial court denied Defendant's motion to suppress the weapon as evidence, and the court of appeals affirmed. The issues on review are: 1) Does the nature of probation justify an exception to the warrant requirement for searches of a probationer's home by a probation officer?; if so, 2) May a probation officer conduct a warrantless search of a probationer's home based on "reasonable grounds," rather than probable cause, to believe the probationer may possess contraband?; if so, 3) Do the facts of this case constitute reasonable grounds to believe that the Defendant possessed contraband?

We hold that by its nature, probation places limitations on the liberty and privacy rights of probationers, and these limitations justify an exception to the warrant requirement. Furthermore, we hold that a probation officer may conduct a warrantless search of a probationer's residence if he has "reasonable grounds" to believe that a probationer has contraband. Because we hold that the search by the probation officers was based on reasonable grounds, we affirm the court of appeals.

On September 4, 1980, Defendant was convicted of resisting arrest, disorderly conduct and obstructing an officer. Defendant was placed on probation for these offenses and was still on probation as of April 5, 1983.

Mr. Michael T. Lew, a supervisor for the State Bureau of Probation and Parole in Beloit, testified at the suppression hearing that on April 5, 1983, he received a phone call from the Beloit Detective Bureau that the Defendant "may have had guns in his apartment." While Mr. Lew believed the source of the information was Truett Pittner, a detective captain, Captain Pittner testified at the suppression hearing that he did not believe he called Mr. Lew, but rather, believed it was one of his detectives. After waiting two or three hours for the Defendant's probation officer, Mr. Lew made arrangements for another proba-

tion agent, Ms. Joanne D. Johnson, to participate in the search, and for three Beloit police officers, Officer Sam W. Lathrop, Officer Gerald A. Leppla and Detective Victor Hanson, to provide protection for him and Ms. Johnson.

Mr. Lew, Ms. Johnson and the three plainclothes police officers went to the Defendant's apartment. When Defendant answered the door, Mr. Lew told Defendant who they were and informed him that they were going to search his residence. Upon entering the apartment, Mr. Lew went into the kitchen to search, Ms. Johnson went into a bedroom to search, and the police officers, who did not search, went into the living room with the Defendant and a woman who lived with Defendant. Upon entering the apartment, Ms. Johnson saw what she perceived to be marijuana on a living room table, but did not take possession of it at that time.

When Mr. Lew entered the living room, followed by Ms. Johnson, one of the officers pointed toward the area where a table, with a broken drawer which made it possible to see inside the drawer, was located. The table was located in the general direction that Mr. Lew was headed. In the drawer, Mr. Lew found a handgun and turned it over to one of the police officers. He then directed the officers to take Defendant "into custody on a probation violation apprehension." Defendant alleged that one of the officers told Mr. Lew that there was a gun in the drawer. Ms. Johnson, upon entering the living room, took possession of the alleged marijuana.

On April 11, 1983, a criminal complaint was filed charging the Defendant with possession of a firearm by a felon, contrary to Section 941.29(2), Stats., and possession of a controlled substance, THC contrary to Sections 161.14(4)( ) and 161.41(3). Both charges were alleged to fall under Section 939.62, allowing for an enhanced penalty for habitual criminality.

Defendant filed the following motions: motion to sever, motion to dismiss habitual criminality allegations, motions to dismiss both charges, motion to suppress all evidence

obtained during the search of his residence and a motion to dismiss for illegal arrest, seeking dismissal on the ground that the arrest was based on evidence obtained in an illegal search. The motions to sever and dismiss the habitual criminality allegations were granted, and all the other motions were denied. The trial court ordered that the trial on the possession of a firearm by a felon precede the trial for the possession of THC.

In denying the Defendant's motions to dismiss because of an illegal arrest and to suppress evidence, the trial court held that Defendant's fourth amendment rights were not violated when the probation officers searched his residence without a warrant. It ruled that a probation officer must act reasonably in making a search of a probationer's residence. Based on the evidence before it, the trial court determined that the search was reasonable. Furthermore, the trial court found as a matter of fact, that the search was not a police search and that the police officers were present to protect the probation officers.

In addition to the handgun, other evidence, obtained from the search, was admitted into evidence at the jury trial on August 18, 1983.

The jury found the Defendant guilty of possession of a firearm by a convicted felon. The charge of possession of THC was dismissed and "read in" at the sentencing. The judgment of conviction and sentence to Wisconsin State Prisons, dated September 16, 1983, sentenced Defendant to a prison term of two years. An amended judgment, dated October 24, 1983, gave Defendant one hundred and one days credit toward the two years sentence. Defendant appealed the judgment and amended judgment to the court of appeals.

In affirming, the court of appeals relied on the logic of *State v. Tarrell*, 74 Wis.2d 647, 247 N.W.2d 696 (1976), to conclude that a probation officer may conduct a warrantless search of a probationer's dwelling even if the search does not meet one of the usual exceptions to the warrant requirement if the search is reasonable. The court

of appeals upheld the "reasonable grounds to believe" standard in the Wisconsin Administrative Code Section HSS 328.21(4) (currently section HSS 328.21(3)(a)) as an adequate protection of a probationer's constitutional rights, and concluded that the tip from the police constituted reasonable grounds to believe that the probationer's living quarters contained contraband. Defendant petitioned this court for review and review was granted.

The constitutional legality of a warrantless search of a probationer's residence by a probation officer raises a question of law. This court reviews questions of law "independently without deference to the decisions of the trial court and court of appeals." *Ball v. District No. 4 Area Board*, 117 Wis.2d 529, 537, 345 N.W.2d 389 (1984).

Defendant's motion to suppress the handgun was based on the fourth and fourteenth amendments to the United States Constitution [2] and art. 1, sections 1 and 11 of the

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[2] The fourth amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourteenth amendment to the United States Constitution provides in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Constitution.[3] The provisions of the fourth amendment and art. 1, section 11 which prohibit unreasonable searches and seizures are almost identical. In *State v. Boggess*, 115 Wis.2d 443, 448-449, 340 N.W.2d 516 (1983), this court stated that the basic purpose of these provisions is:

> "[T]o safeguard the privacy and security of individuals against arbitrary invasions by government officials. *See Michigan v. Tyler*, 436 U.S. 499, 504 [98 S.Ct. 1942, 1947, 56 L.Ed.2d 486] (1978). The United States Supreme Court has consistently held that warrantless searches are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions. *Cady v. Dombrowski*, 413 U.S. 433, 439 [93 S.Ct. 2523, 2527, 37 L.Ed.2d 706] (1973). These exceptions have been 'jealously and carefully drawn', *Jones v. United States*, 357 U.S. 493, 499 [78 S.Ct. 1253, 1275, 2 L.Ed.2d 1514] (1958), and the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 [91 S.Ct. 2022, 2032, 29 L.Ed.2d 564] (1971)."

A person's home or residence is entitled to special dignity and sanctity. *Laasch v. State*, 84 Wis.2d 587, 594, 267

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[3] Article 1, Section 1 of the Wisconsin Constitution provides:

> "Equality; Inherent rights. SECTION 1 . . . . All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights, governments are instituted, deriving their just powers from the consent of the governed."

Article 1, Section 11 provides:

> "Searches and seizures. SECTION 11. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

N.W.2d 278 (1978). The exceptions to the search warrant requirement recognized by the United States Supreme Court include, consent, search incident to a lawful arrest, hot pursuit, exigent circumstances and plain view. *Texas v. Brown*, 460 U.S. 730, 735-736, 103 S.Ct. 1535, 1539-1540, 75 L.Ed.2d 502 (1983); *Washington v. Chrisman*, 455 U.S. 1, 5-7, 9-10, 102 S.Ct. 812, 815-817, 818, 70 L.Ed.2d 778 (1982) (plain view and consent). The state does not rely on any of these recognized exceptions to justify the warrantless search of a probationer's residence by a probation officer, but rather, it relies on the Defendant's probationary status. If there is to be such an exception, its foundation is to be found in the nature of probation. *See, Tarrell*, 74 Wis.2d at 653, 247 N.W.2d 696. Neither this court nor the United States Supreme Court has declared such an exception.

Defendant argues that the court should require the probation agent to obtain a search warrant, absent exigent circumstances. He argues that the *Tarrell* decision created a very limited exception to the warrant requirement based on the fact that the defendant was only subjected to a limited invasion of privacy for a short period of time. Furthermore, Defendant propounds three public policy reasons why this court should not create a probationer exception to the warrant requirement: 1) Probationers are citizens whose constitutional rights should not be limited absent a compelling reason; 2) Such an exception invites abuse by the police; and, 3) Rights of innocent third parties must be considered. In response, the state argues that probationers have a diminished expectation of privacy which justifies the exception to the warrant requirement. It argues that the reasoning employed in *Tarrell* requires the conclusion that warrantless searches of a probationer's residence, by a probation officer, on less than probable cause, are constitutionally acceptable. Finally, the state argues that the policy arguments of the Defendant are unpersuasive.

> "Although there is some authority to the effect that the Fourth Amendment rights of probationers and parolees are of precisely the same scope and dimension as those of the public at large, the weight of authority is to the contrary. . . . And while there is some disagreement as to whether a probationer's Fourth Amendment rights are diminished to the same extent and degree as those of a parolee, there is considerable authority supporting the proposition that probationers may lawfully be subjected to searches which, absent their probation status, would be deemed unlawful because of the absence of probable cause or a search warrant or both." 3 W. LaFave, *Search and Seizure*, Section 10.10, at 421-422 (1978). (Footnotes omitted.)

As the court of appeals pointed out, there is ample authority for the viewpoint that probation or parole officers may conduct warrantless searches of a probationer's or parolee's residence. *See, e.g., United States v. Scott*, 678 F.2d 32, 34-35 (5th Cir. 1982); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975); *People v. Anderson*, 189 Colo. 34, 536 P.2d 302, 305 (1975); *State v. Fields*, 686 P.2d 1379, 1389-1390 (Hawaii 1984); *State v. Pinson*, 104 Idaho 227, 657 P.2d 1095, 1099-1100 (Ct. App. 1983) (evidence obtained from a search of the defendant used in a probation revocation hearing); *People v. Huntley*, 43 N.Y.2d 175, 371 N.E.2d 794, 796, 401 N.Y.S.2d 31 (1977); *State v. Earnest*, 293 N.W.2d 365, 368-369 (Minn. 1980) (evidence obtained used in a probation revocation hearing; *State v. Velasquez*, 672 P.2d 1254, 1260 (Utah 1983); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088, 1094 (1974). There is also some authority for the viewpoint that a probation or parole officer may not search a probationer's or parolee's residence without a warrant, unless one of the judicially recognized exceptions is present. *United States v. Rea*, 678 F.2d 382, 387-388 (2d Cir. 1982) (concluding that such requirement would not significantly interfere with the dual goals of probation); *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978); *State v. Cullison*, 173 N.W.2d 533, 537 (Iowa 1970), *cert. denied*, 398 U.S. 938, 90 S.Ct. 1841, 26 L.Ed.2d 270 (1970) (holding that a parolee's fourth amendment rights receive the same recognition as any other person); *State v. Fogarty*, 187 Mont. 393, 610 P.2d 140, 152 (1980) (holding warrant needed to protect legal interests of innocent third persons).[4]

This court has recognized limits on the liberty and privacy interests of probationers based on the nature of probation. *Tarrell*, 74 Wis.2d at 654, 247 N.W.2d 696. In *Tarrell*, the defendant was on probation for enticing a child for immoral purposes when his probation agent was informed that he was a suspect in a similar offense. Because of the similarity between the two offenses, Tarrell's probation agent ordered him to appear at the police station and be photographed. Defendant complied, but alleged that the required appearance was an unconstitutional seizure of his body and the photographs were also an unconstitutional seizure in violation of the fourth amendment. *Id.* at 652-655, 247 N.W.2d 696. In holding the warrantless seizures constitutional, this court reasoned:

> "If there is to be an exception to the requirements of the fourth amendment granting probation agents a limited right to search or seize a probationer without a warrant, the foundation for this exception lies in the nature of probation itself. Probation, like

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[4] In determining whether the fourth amendment protection against unreasonable searches and seizures has been violated, several courts fail to distinguish between probation status or parole status or treat them as the same. *See, e.g., United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir. 1975); *Pinson*, 657 P.2d at 1098, n. 1; *Earnest*, 293 N.W.2d at 368, n. 2; *Seim v. State*, 95 Nev. 89, 590 P.2d 1152, 1154 (1979); *Velasquez*, 672 P.2d at 1258, n. 2.

parole, "is an integral part of the criminal justice system and has as its object the rehabilitation of those convicted of crime and the protection of the state and community interest.' *State ex rel. Niederer v. Cady*, 72 Wis.2d 311, 322, 240 N.W.2d 626, 633 (1976). While probation is a privilege, not a matter of right, once it has been granted this conditional liberty can be forefeited only by breaching the conditions of probation. A sentencing judge may impose conditions which appear to be reasonable and appropriate. Sec. 973.09, Stats. A sentence of probation places the probationer 'in the custody of the department' subject to the conditions of probation and rules and regulations of the Department of Health and Social Services. Sec. 973.10. *All conditions, rules and regulations must be imposed with the dual goal of rehabilitation of the probationer and protection of the public interest. The imposition of these conditions, rules and regulations demonstrates that while a probationer has a conditional liberty, this liberty is neither as broad nor as free from limitations as that of persons who have not committed a crime.* The expectations of privacy of a person on probation cannot be the same as the expectations of privacy of persons not on probation. It is only the reasonable expectations of privacy which the fourth amendment protects. *Conditions of probation must at times limit the constitutional freedoms of the probationer. Necessary infringements on these freedoms are permissible as long as they are not overly broad and are reasonably related to the person's rehabilitation. By the very nature of probation, limitations on the liberty and privacy of probationers are imposed. These limitations are the bases for an exception to the warrant requirement of the fourth amendment."* *Id.* at 653-654, 247 N.W.2d 696. (Footnotes omitted.) (Emphasis added.)

Furthermore, this court stated that the application of a "less stringent standard for the probation agent's search and seizure" coincides with the agent's dual role of assisting in rehabilitating the probationer and protecting the public. *Id.* at 655, 247 N.W.2d 696. "While there may not have been probable cause for the issuance of a warrant, there was probable cause for the agent's attempt to determine whether Tarrell had complied with the probation conditions." *Id.*

In *Tarrell*, this court determined that the seizures were reasonable, and therefore, constitutional. *Id.* at 656-657, 247 N.W.2d 696. A probation agent has a duty to determine whether the probationer is complying with the terms of his probation, and in *Tarrell*, this court determined that ordering the defendant to have his photograph taken, and the taking of the photograph furthered the agent's efforts to comply with this duty. *Id.* at 655-656, 247 N.W.2d 696.

Tarrell does not hold that a probation agent may conduct a warrantless search of a probationer's residence, in the absence of circumstances that would permit such a search. Nevertheless, the logic employed by the court in *Tarrell*, is equally applicable to this situation. This is similar to the analysis used by other courts to justify such seaches.

In *Earnest*, the Minnesota court looked at the relationship between the probation officer and his probationer and the dual nature of probation. The court recognized that because of this special relationship the "law relating to probation searches cannot be strictly governed by automatic reference to ordinary search and seizure law." *Earnest*, 293 N.W.2d at 368. The *Earnest* court cited this court's decision in *Tarrell* for this proposition. In *Scott*, the fifth circuit focused on the dual role of parole to justify warrantless searches. *Scott*, 678 F.2d at 34-35. In *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-266 (9th Cir. 1975), the ninth circuit recognized that while probationers are subject to constitutional limi-

tations from which other citizens are free, such limitations must serve the ends of probation. In balancing the probationer's right to privacy with the probation system's interest in invading the probationer's privacy, the court concluded that a probation officer need not obtain a warrant prior to a search.

We are not persuaded by the Defendant's argument that this court should not create a probationer exception to the warrant requirement because it will result in abuse by the police. We are not granting a right to the police to undertake a warrantless search. This exception applies to searches conducted by probation agents. It is the nature of probation and the duties placed on probation agents that justify such searches. An otherwise reasonable search should not be deemed unlawful simply because the police are the source of the information that leads to the search.[5] The trial court found that the search was not a police search, and that the police were present for protection purposes.

Nor are we persuaded by the Defendant's argument that a warrant is necessary to protect the rights of innocent third persons who may be living with the probationer. Defendant cites only *Fogarty* for this proposition. *Fogarty*, 610 P.2d at 152. In dicta, the court in *Velasquez* said that caution would suggest that a warrant be obtained if the rights of nonparolees may be involved. *Velasquez*, 672 P.2d at 1260, n.3. In accordance with the court of appeals' decision in this case, we find that a nonprobationer's rights may be affected whether or not a warrant is required. If a warrant were required, the impartial magistrate would determine whether there was probable cause to search the probationer's residence, and the rights of other persons would not be considered.

[5] The following cases upheld warrantless searches by parole or probation agents where the police provided the information justifying the search. *United States ex rel. Santos v. New York State Bd. of Parole*, 441 F.2d 1216, 1218 (2nd Cir. 1971); *People v. Adams*, 36 A.D.2d 784, 319 N.Y.S.2d 372 (1971).

We are not creating a right for probation officers to conduct arbitrary and unreasonable searches. Though a probationer has a diminished expectation of privacy, he still has privacy rights that must be respected. We conclude that the standard which a probation agent must comply with to conduct a warrantless search adequately protects the probationer's rights, and there is no need to require a warrant simply to protect the rights of other persons. *See, People v. Mason*, 5 Cal.3d 759, 488 P.2d 630, 634, 97 Cal.Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016, 92 S.Ct. 1289, 31 L.Ed.2d 478 (1972).

Therefore, based on the nature of probation, we conclude that a probation agent who reasonably believes that a probationer is violating the terms of probation may conduct a warrantless search of a probationer's residence.[6] Furthermore, we conclude that the evidence obtained in the search may be used, as in this case and in *Tarrell*, at a trial seeking a new conviction against the probationer. If the search is otherwise reasonable, such a search is constitutional. Thus, there is no reason to suppress any evidence discovered during a warrantless search of the probationer's residence.

The ultimate standard set forth in the fourth amendment and art. 1, section 11 is one of reasonableness. People have a right to be free from unreasonable searches and seizures. "[T]his court has maintained that the reasonableness of a search or seizure is to be determined by the facts and circumstances of each case." *Tarrell*, 74 Wis.2d at 655, 247 N.W.2d 696. (Citations omitted.) In determining what constitutes a reasonable search, we turn for guidance to those decisions that have

[6] Some courts have justified warrantless searches of a probationer's or parolee's residence based on the grounds of "constructive custody," "waiver" or "implied consent." *See*, 3 W. LaFave, *Search and Seizure*, Section 10.10 (1978); 1 W. Ringel, *Searches and Seizures, Arrests and Confessions*, Section 17.3 (1986). Based on the reasoning employed in *Tarrell*, we rely not on these theories, but rather on the nature of probation.

allowed warrantless searches of a probationer's or parolee's residence by a probation or parole agent. These cases hold that a search may be constitutionally made based on a standard of reasonableness, which is less than probable cause. These cases have variously described this standard. *See, e.g., Scott*, 678 F.2d at 35 (reasonable suspicion supported by specific and articulable facts); *Latta*, 521 F.2d at 250 (plurality decision) (reasonable belief that such search is necessary based on specific facts, although a "hunch" by the parole officer may be sufficient); *Hollen v. Bureau of Corrections*, 565 F. Supp. 1022, 1023 (E.D. Wis. 1983) (reasonableness standard); *Anderson*, 536 P.2d at 305 (reasonable grounds); *Pinson*, 657 P.2d at 1101 (reasonable grounds); *Velasquez*, 672 P.2d at 1260 (reasonable grounds which is defined as a reasonable suspicion); *Simms*, 516 P.2d at 1095-1096 (well founded suspicion). In analyzing the reasonableness of the seizure in *Tarrell*, this court stated that the "application of a less stringent standard for the probation agent's search or seizure is appropriate because of the nature of probation." *Tarrell*, 74 Wis.2d at 655, 247 N.W.2d 696.

Defendant argues that in *Boggess*, 115 Wis.2d at 455, 340 N.W.2d 516, this court determined that the "totality of the circumstances" analysis used in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), is to be used in determining the reasonableness of a search. The Supreme Court in *Gates* used the totality of the circumstances test for the purpose of determining whether probable cause existed to issue a warrant. *Boggess*, 115 Wis.2d at 453, 340 N.W.2d 516. We distinguish *Boggess* from this case on the facts.

In *Boggess*, the court was confronted with a social worker's and police officer's warrantless entry into the defendant's home to determine the safety and welfare of two children. *Id.* at 445, 340 N.W.2d 516. The defendant in *Boggess* was not on probation. Here we are confronted with a probationer whose liberty and privacy interests are limited by the nature of probation. As

stated in *Tarrell*, due to the nature of probation, a less stringent standard for a search and seizure is appropriate.

In accordance with the aforementioned cases, we hold that a warrantless search of a probationer's residence may be made by a probation officer based on "reasonable grounds to believe that the probationer has contraband at his residence.

The Department of Health and Social Services has promulgated a rule which allows probation agents to search a probationer's residence "if there are reasonable grounds to believe that the quarters . . . contain contraband." Section HSS 328.21(3)(a), Wis. Adm. Code.[7] Contraband is defined as "[a]ny item whose possession is forbidden by law." Section HSS 328.16(1)(b), Wis. Adm. Code. Section 941.29(2), Stats., makes it unlawful for a convicted felon to possess a firearm. An administrative agency is bound by its regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-540, 79 S.Ct. 968, 972-973, 3 L.Ed.2d 1012 (1959).

We agree with the court of appeals' decision in this case, and we conclude that the reasonable grounds standard in the Administrative Code is less than the probable cause standard needed to obtain a warrant. The notes to Section HSS 328.21 provide that "[a]lthough it is preferable to have searches and seizure[s] conducted by law enforcement authorities, *that may not always be feasible or advisable.* It is therefore deemed important to give field staff the authority to conduct reasonable searches at reasonable times." (Emphasis added.) The note further provides that although discovery of contraband is important, uncontrolled searches should not be allowed. The note then cites *Tarrell* for the proposi-

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[7] Effective May 1, 1986, Section HSS 328.21, Wis.Adm.Code, was repealed and recreated. While the form and numbering of the rule was changed, only minor substantive changes were made to the rule in existence on the date of the search. This opinion will cite to the new rule and will make note of any substantive changes that have been made.

tion that a less stringent standard for an agent's search is appropriate.

We hold that the "reasonable grounds" standard of section HSS 328.21(3)(a), Wis. Adm. Code, meets the constitutional standard of reasonableness. Section HSS 328.21(6), Wis. Adm. Code, provides the following guidelines for implementing the test:

> "(6) CONTRABAND. In deciding whether there are reasonable grounds to believe that a client possesses contraband or that a client's living quarters or property contain contraband, a staff member shall consider:
>
> "(a) The observations of staff members;
>
> "(b) Information provided by informants;
>
> "(c) The reliability of the information relied on. In evaluating reliability, attention *shall* be given to whether the information is detailed and consistent and whether it is corroborated;
>
> "(d) The reliability of the informant. In evaluating reliability, attention *shall* be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information;
>
> "(e) The activity of the client that relates to whether the client might possess contraband;
>
> "(f) Information provided by the client that is relevant to whether the client possesses contraband;
>
> "(g) The experience of a staff member with that client or in a similar circumstance;
>
> "(h) Prior seizures of contraband from the client; and
>
> "(i) The need to verify compliance with rules of supervision and state and federal law." (Emphasis added.)[8]

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[8] Under the old rule, Section HSS 328.21(7), Wis.Adm.Code, the "shalls" were "shoulds."

Finally, we conclude that Mr. Lew had "reasonable grounds" to search the probationer's residence. At the motion hearing on August 15, 1983, the trial court found that the search in question was not a police search, and that the purpose of the police officers in going to the probationer's residence was for the protection of Mr. Lew and Ms. Johnson. The trial court also found, as a matter of fact, that the tip "that there were . . . or maybe there were guns in the probationer's apartment," did not come from an ordinary patrolman, but rather, it came from a detective on the Beloit Police Department. Based on the evidence before it, the trial court determined that the probation officer acted reasonably in making the search.

The question of whether a search is reasonable is a question of constitutional fact, and we review constitutional questions independent of the conclusions made by the lower courts. *State v. Woods*, 117 Wis.2d 701, 715, 345 N.W.2d 457 (1984). However, the trial court's findings of evidentiary or historical facts, relevant to the issue of whether the search was reasonable, will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *See, Id.*, at 714-715, 345 N.W.2d 457.

The record shows that Mr. Lew received a telephone call from the Beloit Detective Bureau that the Defendant "may have had" or "had" guns at his residence. Although Detective Pittner, who Mr. Lew believed had provided the tip, did not recall contacting Mr. Lew, he did state that he believed that one of his detectives contacted the Probation and Parole Department with the information. The record does not contradict the trial court's finding that Mr. Lew received a tip from a detective.

The record before the trial court also supports its finding that this was not a police search. The record shows that Mr. Lew testified that he requested police assistance for protection purposes and that the police did not

search. The record shows that upon entering Defendant's residence, Mr. Lew went to search the kitchen, Ms. Johnson went to search a bedroom, and the officers went into the living room with the Defendant and his woman friend. Upon entering the living room, Mr. Lew found the gun in a drawer that was apparently broken, and because it was broken, Mr. Lew could see the weapon in the drawer before he opened it. While there is testimony by Mr. Lew that an officer pointed in the direction of the table when Mr. Lew entered the living room, and testimony by Defendant that an officer informed Mr. Lew that there was a gun in the drawer, this evidence does not turn this into a police search. Mr. Lew testified that he was already headed in that direction. Mr. Lew and Ms. Johnson conducted the search and the police were there for protection purposes.

To determine whether Mr. Lew had "reasonable grounds" to conduct this warrantless search of Defendant's residence, we turn to the considerations set forth in Section HSS 328.21(6), Wis. Adm. Code. Mr. Lew was provided information by an informant, an anonymous detective from the Beloit Detective Bureau. *See*, Section HSS 328.21(6)(b), Wis. Adm. Code. The information was detailed, in that it informed Mr. Lew that the Defendant may have guns at his residence, and it came from a source that did not have reason to supply inaccurate information. *See*, Section HSS 328.21(6)(c) and (d), Wis. Adm. Code. Based on this information, it was reasonable for Mr. Lew to verify Defendant's compliance with state law, *see*, Section HSS 328.21(6)(i), by conducting a search. Since Defendant was a convicted felon, it was unlawful for him to possess a firearm.

Here, Mr. Lew had information that the Defendant may have a weapon, which could have been used to injure or kill another. "That weapons be kept out of the hands of clients is critical for the safety of others. Contraband must also be kept out of the hands of clients so

they may be better able to effectively participate in jobs, schooling or training, and other programs." Note to Section HSS 328.21. A probation agent has a duty to see that a probationer is complying with the terms of his probation. The search conducted here was constitutional.

The decision of the court of appeals is affirmed.

SHIRLEY S. ABRAHAMSON, Justice (dissenting).

I agree with the majority that the fourth amendment governs probation searches. I agree with the majority that probationers have an expectation of privacy but that their expectation is not the same as that of other citizens who are not on probation. I agree with the majority that the probation officer must have latitude in observing the probationer and the probationer's home if the probation officer is to exercise his or her supervisory responsibilities.

This case does not, however, involve a probation officer making a home visit, which is generally regarded as an important part of the supervision. This case involves a probation officer making a search of the probationer's home. This kind of supervision is not usual. As the Department of Health and Social Services has stated, "it is preferable to have searches and seizure conducted by law enforcement authorities, [but] that may not always be feasible or advisable." Appendix, Section HHS 328.21, Wis. Adm. Code (Reg., April 1986, No. 364, p. 243).

I agree with the majority that a full search of the probationer's home is permissible without the usual quantum of probable cause. I depart from the majority because I would require that the evidence be suppressed in a criminal case unless the search was conducted by the probation officer with a warrant unless the case falls within one of the traditional exceptions to the warrant rule, *e.g.*, exigent circumstances. The rule under the constitution is that there should be a warrant. That requirement should not be easily cast aside.

I would allow the probation officer to search a probationer's home if the officer has reasonable cause to believe that the probationer is violating or is in imminent danger of violating a condition of probation and that the officer has reasonable cause to believe that evidence of the violation will be found in the home to be searched. Evidentiary support for the reasonable cause standard need not meet the standards of *Gates*, or *Aguilar-Spinelli*. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1969); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). As Judge Hufstedtler explained, the standard should be "sufficiently flexible to accommodate the [probation] officer's supervisory obligations, but not so loose as to offer the [probationer] and his family no protection from arbitrary intrusions by the [probation] officer or from searches that are unjustifiably broad." *Latta v. Fitzharris*, 521 F.2d 246, 257 (9th Cir. 1975) (Hufstedtler, J. dissenting).

In deciding whether to issue the warrant and in definding its terms, the judge would take into account the strength of the showing of reasonable cause and such additional factors as the nature of the probation violation suspected, the extent to which persons other than the probationer would have their privacy invaded by the search, and the existence of means less intrusive than the search to meet the probation officer's supervisory responsibilities. The issuance of a warrant on this kind of showing is not an undue burden on the probation officer and provides the protection for the probationer guaranteed by the constitutions. Requiring an officer to articulate reasons for the search is a deterrent to impulsive or arbitrary governmental conduct—and that is what the fourth amendment is about. Upholding the warrant requirements for searches of the probationer's home does not impede the dual goals of probation, protecting the public and rehabilitation. *Latta*, *supra* 521 F.2d at 257.

Professor LaFave characterizes Judge Hufstedtler's dissent in the *Latter* case as "cogently reasoned." *Search and Seizure*, sec. 10.10, p. 441 (1978). I am persuaded by her dissent and the similar reasoning in *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982).

Because there was a search of this probationer's home without a warrant and there is no claim that the case falls within one of the exceptions to the warrant requirement, I would suppress the evidence.

Even if I were to agree with the majority that no warrant was needed, I would have to dissent because the facts in this case do not satisfy the tests set forth by the majority and the Department of Health and Social Services.

BABLITCH, Justice (dissenting).

The facts in this case do not meet the majority's own test for reasonable grounds justifying the probation officers to search Griffin's residence for contraband nor do the facts satisfy the Department of Health and Social Services' (DHSS) standards for reasonable grounds to believe that a probationer possesses contraband. Section 328.21(3)(a), Wis. Adm. Code.

The only basis for the fullblown, warrantless search of Griffin's home by probation officers was the supervisory's testimony that a police detective told him that Griffin "may have had guns in his apartment." Nothing more. We do not know which detective telephoned the probation department with this information. We do not know the source of the detective's information. We do not know any fact which indicates that the probation supervisor had reason to believe that Griffin ever had anything to do with guns.

The facts in this case fail to satisfy any of nine standards in sec. 328.21(6), Wis. Adm. Code, which sets forth the DHSS's guidelines for implementing the test for reasonable grounds for a search which the majority adopts. Maj. op. at p. 542. First, the record indicates that the

probation staff did not rely on observations of its own members in any respect, in disregard of sec. 328.21 (6) (a). Second, although sec. 328.21 (6) (b) authorizes the department to consider "information provided by informants," the record does not establish that the department tested the "information" on which it acted by asking for any detail whatsoever. Third, the record shows that the probation staff did not try to evaluate the reliability of the detective's information or corroborate the tip in any manner, in violation of sec. 328.21 (6) (c). Fourth, the record lacks any suggestion that the probation officers tried to evaluate the reliability of their informant, in disregard of sec. 328.21 (6) (d). Fifth, the record shows no reason for the department to conclude from Griffin's past activities that he might possess a gun in his apartment, as required by sec. 328.21 (3) (e). Sixth, the record lacks any indication that Griffin provided the probation department any information relevant to whether he possessed a gun, as required by sec. 328.21 (6) (f). Seventh, nothing in the record shows that the probation staff relied on experience with Griffin or another probationer in similar circumstances to justify a search, as sec. 328.21 (6) (g) permits. Eighth, the record does not show any prior seizures of guns from Griffin, which might make a search reasonable under sec. 328.21 (6) (h). Finally, there is no fact in this record which suggests that the department justified its search of Griffin's apartment by any specific need to verify whether he was complying with the rules of his supervision or state and federal law, which sec. 328.21 (6) (i) allows.

For this reason, I cannot conclude that the search of Griffin's apartment meets even the minimal standard which the majority now adopts.

SUPREME COURT OF THE UNITED STATES

No. 86-5324

JOSEPH G. GRIFFIN, PETITIONER

v.

WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 8, 1986

PETITIONER'S

BRIEF

No. 86-5324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH G. GRIFFIN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITIONER'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I. May a state probation officer lawfully search the residence of a state probationer for evidence of the commission of a crime, which is then used in a criminal prosecution of the probationer, without first obtaining a search warrant, in the absence of consent or any of the factors previously recognized by this Court as constituting "exigent circumstances?"

II. Regardless of whether a warrant is required for such a search, must the search be based upon probable cause to believe that the evidence was present in probationer's residence, or may the search be based upon a lesser standard of reasonable grounds to believe that the evidence was present in probationer's residence?

III. Did the information available to the probationer officers in this case prior to their search of probationer's residence satisfy either the standard of probable cause or the lesser standard of reasonable belief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Other Authorities

Table of Authorities Continued

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the Wisconsin Supreme Court (J.A. 99) is reported as *State* v. *Griffin*, 131 Wis.2d 41, 388 N.W.2d 535 (1986).

The opinion of the Wisconsin Court of Appeals (J.A. 77) is reported as *State* v. *Griffin*, 126 Wis.2d 183, 376 N.W.2d 62 (1985).

The opinion of the trial court (J.A. 42) is not reported in any official or unofficial report.

JURISDICTIONAL STATEMENT

The statutory provision on which the jurisdiction of this Court is invoked is 28 U.S.C. § 1257(3), which provides for review by Writ of Certiorari to the highest court of a State in which a decision could be had, where a right is claimed under the United States Constitution.

28 U.S.C. § 2101(d) provides that the time for application for a Writ of Certiorari to review the judgment of a State court in a criminal case shall be as prescribed by the rules of the Supreme Court.

Supreme Court Rule 20.1 provides that a Petition for Writ of Certiorari to review the judgment in a criminal case of a State court of last resort shall be filed with the Clerk within 60 days after the entry of such judgment. The judgment of the Wisconsin Supreme Court sought to be reviewed herein was entered on June 20, 1986, and the Petition for Writ of Certiorari herein was filed on August 19, 1986, thereby complying with the requirements of Rule 20.1.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

I. Amendments to the United States Constitution, Article IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizuers, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Amendments to the United States Constitution, Article XIV, Section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 4, 1980, petitioner was convicted of the misdemeanors of resisting arrest, disorderly conduct and obstructing an officer. (R. 2) Petitioner was placed on probation for those offenses, and, as of April 5, 1983, petitioner was still on probation for those offenses. (R. 38:4)

On April 5, 1983, petitioner's residence was searched by Mr. Michael Lew, a supervisor for the State Bureau of Probation and Ms. Joanne Johnson, a probation agent (but not petitioner's probation agent) for the state Bureau of Community Corrections. (R. 38:4, 21) Mr. Lew and Ms. Johnson were accompanied by Officers Lathrop, Leppla and Hanson of the City of Beloit Police Department, who also entered petitioner's residence. (R. 38:13)

Mr. Lew was the person who made the arrangements to have Ms. Johnson and the police officers accompany him to petitioner's residence. (R. 38:7) Mr. Lew claimed that he

organized the search of petitioner's residence because he had been informed, through a phone call on the morning of April 5, 1983 from the City of Beloit Police Detective Bureau, that petitioner "may have had guns" in petitioner's residence. (R. 38:4, 7) Mr. Lew could not recall the name of the City of Beloit police officer who provided that information (R. 38:7), but he believed that it might possibly have been Truett Pittner. (R. 38:7) However, Truett Pittner testified that, although he was a detective captain with the City of Beloit Police Department on April 5, 1983, he did not recall contacting Mr. Lew regarding the search of petitioner's residence. (R. 38:38)

Mr. Lew waited two or three hours after receiving the initial phone call from the City of Beloit Police Detective Bureau before making arrangements with the City of Beloit Police to provide officers to accompany Mr. Lew and Ms. Johnson to petitioner's residence. (R. 38:7, 8) Mr. Lew specifically informed the City of Beloit Police that the purpose for which Mr. Lew desired their protection was to search petitioner's residence. (R. 38:8)

When Mr. Lew, Ms. Johnson and the three police officers arrived at petitioner's residence, all five of them were in plain clothes. (R. 38:9) Mr. Lew went to the door of the petitioner's residence, and petitioner answered the door. (R. 38:9) Upon petitioner's answering the door, Mr. Lew told petitioner that "we are going to search his residence." (R. 38:9) Mr. Lew identified himself and stated that Ms. Johnson was there to assist Mr. Lew with the search of the petitioner's residence; Mr. Lew also informed petitioner that the other three persons were police officers. (R. 38:10)

After this interchange, all five persons entered petitioner's residence. Mr. Lew entered the foyer, and then

went to the kitchen. (R. 38:11) Ms. Johnson went into a bedroom, (R. 38:11) and the officers went into the living room, (R. 38:11) with petitioner and Ms. Tanya Turner, a woman who lived at petitioner's residence with petitioner and petitioner's child. (R. 38:30, 31)

When Ms. Johnson was walking through the foyer, she noticed a baggie of what she believed to be marijuana sitting on a table, but did not take possession of it at that time. (R. 38:23) After making that observation, Ms. Johnson then walked into the bedroom. (R. 38:23) Ms.Johnson then walked into the kitchen, and met Mr. Lew there. (R. 38:24) The two of them then walked into the living room, with Mr. Lew in the lead. (R. 38:24) When they arrived in the living room, the suspected marijuana was still on the table, and Ms. Johnson picked it up and put it in a brown paper bag. (R. 38:26)

As Mr. Lew was entering the living room one of the officers pointed toward the area in which a table, with a television on top of it, was sitting, with a half empty drawer in the table. (R. 38:6, 12, 13) In the drawer Mr. Lew found the handgun which formed the basis for the prosecution of petitioner in this action. (R. 38:6, 12, 13) Mr. Lew turned the gun over to one of the accompanying police officers for "safe keeping" (R. 38:13). Ms. Johnson took possession of the alleged marijuana and did not turn it over to the police. (R. 38:13, 14) Once Mr. Lew found the gun, Mr. Lew directed the accompanying police officers to arrest petitioner, which was done. (R. 38:16)

On April 11, 1983, a Criminal Complaint was filed in Rock County Circuit Court, Branch IV, charging petitioner with possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2), and possession of THC, contrary to Wis. Stat. § 161.14(4)(t) and § 161.41(3); both charges

were alleged to fall under the provisions of Wis. Stat. § 939.62(1)(b) for enhanced penalty for habitual criminality. (R. 1)

Defendant waived preliminary hearing on April 28, 1983 and was bound over for trial to Rock County Circuit Court, Branch IV. (R. 37)

On May 3, 1983, an Information was filed in Rock County Circuit Court, Branch IV, charging petitioner with the same offenses as were charged in the Criminal Complaint. (R. 2)

An arraignment was held on May 16, 1983, at which time petitioner stood mute, and not guilty pleas were entered on behalf of the petitioner to each of the charges in the Information. (R. 36:11)

Subsequent to the arraignment, petitioner filed a Motion to Sever, (R. 14), a Motion to Dismiss Habitual Criminality Allegation (R. 10), a Motion to Suppress all evidence obtained during, or as the fruit of, the search of petitioner's residence (R. 9) and a Motion to Dismiss—Illegal Arrest, seeking the dismissal of the action based upon the ground that petitioner's arrest was based upon evidence obtained as a result of the illegal search of petitioner's residence. (R. 8)

On July 15, 1983, testimony was taken on petitioner's Motion to Suppress and Motion to Dismiss—Illegal Arrest. (R. 38) On August 15, 1983, the trial court granted the Motion to Sever. (R. 39:3) Also on that date, the trial court denied petitioner's Motion to Suppress and Motion to Dismiss—Illegal Arrest. (R. 39:26) A written order to that effect was signed by the trial court on September 2, 1983. (R. 23) Finally, on that date the trial court granted petitioner's Motion to Dismiss Habitual Criminality Allegation. (R. 39:47) The trial court then

ordered that the trial on the charge of possession of a firearm by a felon would precede the trial of the charge of possession of THC, (R. 39:49, 50) The possession of THC charge was ultimately dismissed by the State.

At the trial of this action on August 18, 1983, Mr. Lew testified that, along with the aforementioned handgun, several bullets were also found during the search of petitioner's residence. (R. 40:63) At the trial, Ms. Johnson testified that she found the bullets in question. (R. 40:71) Ms. Johnson testified that, after the gun had been found, petitioner was allowed to make a telephone call to petitioner's mother, and that Ms. Johnson heard petitioner "tell the person on the other end that he had gotten busted with a gun that John H. gave to him." (R. 40:88)

The substance of this telephone call was also testified to by City of Beloit Police Officer Sam W. Lathrop. (R. 40:101)

Petitioner testified regarding both the gun, (R. 40:188 *et seq*) and the telephone call. (R. 40:191, 192)

Ms. Rose Griffin, the person to whom petitioner spoke in that telephone call, also testified regarding the telephone call. (R. 40:219 *et seq*)

On rebuttal, the state put Mr. Lew back on the stand, and he testified to statements made by petitioner to Mr. Lew, during the search of petitioner's residence, concerning possession of the gun. (R. 40:239) City of Beloit Police Officer Victor Hanson also testified that petitioner made a statement, during the course of the search of petitioner's residence, that petitioner was "holding" the gun. (R. 20:244) In response to this rebuttal testimony, petitioner again took the stand, and denied making the statements in question. (R. 40:248 *et seq*)

On August 18, 1983, the jury returned a verdict of guilty. (R. 30) On September 16, 1983, a sentencing hearing was held, at the conclusion of which the Court imposed a sentence of two years imprisonment. (R. 42)

A Judgment of Conviction and Sentence to Wisconsin State Prisons (R. 26) adjudging petitioner guilty of possession of a firearm as a convicted felon, in violation of Wis. Stat. § 941.29(2), and imposing a prison term of two years, was entered on September 16, 1983. On October 24, 1983, an Amended Judgment of Conviction and Sentence to Wisconsin State Prisons was entered by the trial court, which was identical to the original judgment, except that it included one hundred and one days credit toward petitioner's sentence for pre-trial and pre-sentencing incarceration. (R. 32) From these judgments of conviction and sentence to Wisconsin State Prisons petitioner filed a Notice of Appeal to the Wisconsin Court of Appeals. (R. 33)

The Wisconsin Court of Appeals affirmed petitioner's conviction, ruling that a warrant was not required for the search of petitioner's residence, that a diminished standard of "reasonable grounds to believe" was all that was required to justify the warrantless search of petitioner's residence, and that that standard had been met in this case.

From that decision, petitioner filed a Petition for Review in the Wisconsin Supreme Court, which was granted on December 11, 1985. On June 20, 1986, the Wisconsin Supreme Court entered its decision affirming the decision of the Wisconsin Court of Appeals on the grounds that the nature of probation diminishes a probationer's reasonable expectation of privacy to such an extent that a warrant is not required for a probation agent

to search a petitioner's residence; that that diminished expectation of privacy further entails that such a search need not be based upon probable cause, but may be based upon mere reasonable grounds to believe that the evidence sought will be found at the probationer's residence; that the information possessed by the probation officers in this case was sufficient to meet that lesser standard; and that the search of petitioner's residence was therefore lawful, and the evidence obtained thereby was properly admitted against petitioner at petitioner's trial.

From that judgment of the Wisconsin Supreme Court, petitioner filed a Petition for Writ of Certiorari in this Court, which this Court granted on December 8, 1986.

SUMMARY OF ARGUMENT

I. It is petitioner's position that a search of a probationer's home for the purpose of seizing evidence of a crime, when is then used in a criminal prosecution of the probationer, must be based upon a warrant, in the absence of consent or an exception to the warrant rule based upon the existence of exigent circumstances. The State has not sought to justify the search of petitioner's home on the basis of either consent or any of the traditionally recognized exigent circumstances, but has asserted that petitioner's probationary status, *per se*, justifies the warrantless search of his home. This Court has repeatedly stressed that a person's privacy interest is at its highest in his own home and that, in the absence of consent or exigent circumstances, the warrantless search of a person's home is unreasonable, and therefore violates the Fourth Amendment. There is no reason why this rule should be changed to allow a "probationer" exception. This case does not involve a routine supervisory visit to a probationer's home, which petitioner agrees may be made

without a warrant. Nor does this case involve the issue of the admissibility in a probation revocation proceeding of evidence seized in such a search. What this case does involve is a full-blown search for the specific purpose of uncovering evidence of a crime to be used in a criminal prosecution. There is nothing about the nature of probation which requires allowing such searches to be made without first obtaining a warrant. If action is required so promptly that there is no time to obtain a warrant, even by telephone, the normal exigent circumstances exceptions to the warrant rule will allow such action to be taken. In the absence of exigency, there is no reason beyond mere administrative convenience why a warrant should not be required before a search of probationer's home may be conducted.

II. It is petitioner's position that, regardless of whether a warrant is required, the search of a probationer's home for the purpose of uncovering evidence to be used in a criminal prosecution must be based upon probable cause, as opposed to the lesser standard of reasonable belief. This Court's willingness to tolerate certain types of searches, such as traffic stops or "stop and frisks," on less than probable cause has been based solely upon the brevity and minimally intrusive nature of such searches. The search of a probationer's home is as intrusive a search as can be made, and it is therefore not appropriate to allow such a search to be made on less than probable cause. There exists no compelling reason based upon the nature of probationary supervision which would require allowing such evidentiary searches, as opposed to routine supervisory visits, to be made upon less than probable cause.

III. Regardless of whether the standard is probable cause or reasonable belief, the information available to the probation supervisor at the moment of the search can not

meet it. This information consisted of nothing more than a bare allegation that petitioner may have had a gun at petitioner's residence. The information came from a completely unknown source, was filtered through an unidentifiable police officer, and finally found its way to the ears of the probation supervisor. No attempt was made by any government agent to determine the credibility of the source or the reliability of the information, nor is there any way to tell how long the informant had the information before passing it on to the police officer, or how long the police officer had the information before passing it on to the probation supervisor. Even reasonable belief, much less probable cause, requires the existence of specific, articulable facts, as opposed to mere conclusory statements, sufficient to meet the standard; such facts are completely absent in this case.

ARGUMENT

I. INTRODUCTION

On April 5, 1983, the home of petitioner Joseph Griffin, Tanya Turner and their child was invaded by a probation agent, a probation supervisor, and three police officers. They came without warning, and they came without a warrant.

This was no routine home visit by a probation officer for the purpose of maintaining contact with a probationer; the probation agent was not petitioner's regular probation agent, and neither was her supervisor, and the searchers neither sought nor obtained consent to their entry and search. Rather, it was a search which was planned and executed by the supervisor, with the assistance of the probation agent and the police officers, for the explicit purpose of locating evidence of the commission of a crime

by petitioner, namely, the possession of a firearm, which evidence was then used to support the prosecution of petitioner for that crime.

The sole justification for the search was the information relayed to the supervisor by an unknown police officer, to the effect that an anonymous informer had called the police officer and stated that petitioner "may have had guns" in petitioner's residence. After waiting two or three hours, during which period the supervisor made no attempt to confirm the reliability and accuracy of this information, the supervisor enlisted the aid of the probation agent and the three police officers, and took them with him to petitioner's residence where the search was conducted. It was one of the police officers who first discovered the firearm; it was to the police officers that the firearm was delivered after the search was completed; and it was the police officers who arrested petitioner at the conclusion of the search. A criminal prosecution was commenced against petitioner on the basis of his possession of the firearm, and petitioner was ultimately convicted and sentenced to prison based upon the evidence discovered in the search.

The sole justification advanced by the State in support of this search is that petitioner was on probation at the time of the search. Were that not the case, it is patently clear that the search constituted a gross violation of petitioner's Fourth Amendment rights, since it was not made pursuant to a warrant, petitioner did not consent to it, there were no exigent circumstances excusing the failure to obtain a warrant, and in any event the search was clearly not based upon probable cause. It is petitioner's position that the mere fact of petitioner's probationary status furnishes no grounds for countenancing such a clear-cut and egregious violation of the constitutional pro-

tections enjoyed by every citizen of this country, and that there is no reason why the home of a probationer and his family should not be shielded from this type of government intrusion by the normal warrant requirement of the Fourth Amendment.

II. IN THE ABSENCE OF EITHER A WARRANT, CONSENT OR EXIGENT CIRCUMSTANCES, THE SEARCH OF PETITIONER'S RESIDENCE WAS UNLAWFUL

> The poorest man in his cottage may bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter - but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement!
>
> William Pitt[1]

This Court's decisions interpreting the Fourth Amendment constitute a body of law which, like a living organism, grows and changes over time. However, through all this ebb and flow, this Court has undeviatingly adhered to the fundamental principle that warrantless searches of a person's home are *per se* unlawful, in the absence of consent or exigent circumstances.

> The Fourth Amendment protects the individual's privacy in a variety of settings. *In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home*—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511, 5 L.Ed.2d 734, 81 Supreme Court 679, 97 ALR2d 1277. In terms that apply equally to seizures of property and to seizures of person, *the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.*
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> *Payton* v. *New York* 445 U.S. 573 at 589, 590, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) [Emphasis added]

[1] As quoted in *The March of Folly*, by Barbara W. Tuchman (Alfred A. Knopf, Inc. 1984)

The burden of establishing consent is on the government, "a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida* v. *Royer*, 460 U.S. 491, 497, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). The searchers of petitioner's home neither sought, nor obtained, his consent to the search; petitioner was merely informed of the identity of the searchers, and that the search was going to take place. While petitioner certainly did not forcibly resist the search, this was no more than "mere submission to a claim of lawful authority," and does not establish consent. The decision of the Wisconsin Supreme Court did not use consent as a justification for the search, for the excellent reason that consent did not exist.

In the absence of consent, a warrantless entry into, and search of, a person's home can be justified only upon a showing of exigent circumstances. This Court has repeatedly warned against an expansive interpretation of the "exigent circumstances" exception to the warrant requirement:

> Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are

- "few in number and carefully delineated," *United States* v. *United States District Court*, *supra*, at 318, 32 L.Ed.2d 752, 92 S.Ct. 2125, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see, e.g., *United States* v. *Santana*, 427 U.S. 38, 42-43, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976) (hot pursuit of a fleeing felon); *Warden* v. *Hayden*, 387 U.S. 294, 298-299, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967) (same); *Schmerber* v. *California*, 384 U.S. 757, 770-771, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966) (destruction of evidence); *Michigan* v. *Tyler*, 436 U.S. 499, 509, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

  Welsh v. *Wisconsin*, 466 U.S. 740, 749-750, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984).

To this list can be added an "emergency" exception, pursuant to which the government may make warrantless entries and searches when there exist reasonable grounds to believe that a person within the premises to be searched is in need of immediate aid. *Mincey* v. *Arizona*, 437 U.S. 385, 394, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978).

The Wisconsin Supreme Court did not assert that any of the traditionally recognized "exigent circumstances" justified the warrantless search of petitioner's residence, for the adequate reason that such "exigent circumstances" did not exist. Not only did the probation supervisor wait two or three hours before instituting the search of petitioner's residence, thereby belying any claim of perceived urgency on the part of the probation supervisor, but it is impossible to tell whether the information relayed to the probation supervisor by the police department had been possessed by the police department, or, for that matter,

by the anonymous informer who passed it on to the police department, for minutes, hours, days or even weeks. Since the Wisconsin Supreme Court did not rely upon the doctrine of "exigent circumstances," and since "exigent circumstances" in fact did not exist, petitioner does not anticipate that the State will assert their existence before this Court.

Finding no exception to the warrant requirement in this Court's decisions which would justify the warrantless search of petitioner's home, the Wisconsin Supreme Court simply created one out of whole cloth.

> If there is to be such an exception, its foundation is to be found in the nature of probation. Neither this Court nor the United States Supreme Court has declared such an exception. *State* v. *Griffin*, 131 Wis.2d 41, 51, 388 N.W.2d 535, 538.

Asserting that probationers have a diminished expectation of privacy, the Wisconsin Supreme Court concluded that:

> We hold that by its nature, probation places limitations on the liberty and privacy rights of probationers, and these limitations justify an exception to the warrant requirement. *Griffin*, *supra*, 131 Wis.2d at 45, 46, 388 N.W.2d at 536.

The reasoning, and holding, of the decision of the Wisconsin Supreme Court reveals a fundamental lack of understanding of the purpose of the warrant requirement of the Fourth Amendment. That being the case, it is not surprising that, while the opinion of the Wisconsin Supreme Court repeatedly states its conclusion that probationers have a diminished expectation of privacy, it contains no cogent argument explaining *why* it is that a probationer, unlike any other citizen of this country,

should not be entitled to the protection of the Fourth Amendment's warrant requirement.

When it comes to searches of a person's home, the Fourth Amendment requires both that the search be made pursuant to a warrant (in the absence of the exceptions discussed *supra*) *and* that the search be based upon probable cause. As has been consistently recognized by this Court, these requirements are analytically distinct, and serve very different functions.

As this Court has held:

> It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313, 32 L.Ed.2d 752, 92 S.Ct. 2125 (1972). And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. See *Johnson* v. *United States*, 333 U.S. 10, 13-14, 92 L.Ed. 436, 68 S.Ct. 367 (1948).[10]

* * *

[10] In *Johnson*, Justice Jackson eloquently explained the warrant requirement in the context of a home search:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable

> security and freedom from surveillance. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*" 333 U.S., at 13-14, 92 L.Ed.436, 68 S.Ct. 367 (footnote omitted).

Welsh, supra, 466 U.S. at 748, 749 [Emphasis added]

The requirement that a search be made pursuant to a warrant is distinct from the requirement that the search be based upon probable cause. The requirement of probable cause exists to insure that a person's privacy will not be invaded unless there is a substantial basis for that invasion. The purpose of the warrant requirement is very different; its function is to insure that the decision to violate as paramount a privacy interest as that of a person in his own home is made by a neutral and detached magistrate, not by the policeman or other government agent seeking to make the search.

The analytical framework for determining whether an exception to the normal warrant requirement should be created was explained by this Court in *Camara* v. *Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967):

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, *the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant*, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See *Schmerber* v. *California*, 384 U.S. 757, 770-771, 16 L.Ed.2d 908, 919, 920, 86 S.Ct. 1826. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a

reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

Camara, supra, 387 U.S. at 533 [emphasis added]

This separation of these two issues, and the proper analytical framework to be applied to the issue of creating an exception to the warrant requirement, was recently reaffirmed by this Court in *New Jersey* v. *T.L.O.* 469 U.S. 325, L.Ed.2d 720, 105 S.Ct. 733 (1985). In holding that the warrant requirement was not applicable in a school setting this Court, citing *Camara, supra*, held that the basic test was whether "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *T.L.O., supra*, 469 U.S. at 340, and went on to rule that maintenance of the swift and informal disciplinary procedures needed in a school setting renders the warrant requirement unsuitable to school searches.

The specific holding in *Camara, supra*, was that a warrant is required for even routine administrative health and safety inspections by municipal authorities, despite the obvious public health and safety concerns addressed by such inspections. In so holding, the Court specifically held that there was no reason to believe that the normal health and safety inspections could not achieve their goals within the confines of a warrant requirement, and, in any event, true emergency situations could be adequately dealt with under already exisiting exceptions to the warrant requirement. *Camara, supra*, 387 U.S. at 533, 539.

The issue before this Court is not whether the public interest justifies the search of probationers' residences, but, rather, whether the search of a probationer's residence must be authorized by a warrant, which in turn requires resolution of the question of whether requiring

that a warrant be first obtained will frustrate the governmental purpose behind the search.

The fundamental flaw with the opinion of the Wisconsin Supreme Court is that it completely fails to perform this analysis. That Court held that probationers have a diminished expectation of privacy, and that therefore the warrant requirement does not apply. However, the statement that a probationer's diminished expectation of privacy entails an abrogation of the warrant requirement is a legal conclusion, and not a justification. While the decision of the Wisconsin Supreme Court is replete with statements that the search of a probationer's residence may be useful, or even necessary, in order to fulfill the public protection or rehabilitation functions of probation, nowhere does that opinion demonstrate that the requirement that a warrant be obtained before performing such a search will frustrate the purposes of the search. If enforcing the warrant requirement will not frustrate the purposes of the search, then there exists no justification for doing away with the warrant requirement. In short, the argument of the Wisconsin Supreme Court is a *non sequitur.*

In order to properly address the question of whether the nature of probation requires the abrogation of the warrant requirement of the Fourth Amendment, the test to be applied, as set forth by this Court in *Camara, supra*, is whether requiring a warrant would inevitably frustrate the governmental purpose behind the search. To perform this analysis, it is essential to clearly focus on the nature and purpose of the search which was made of petitioner's residence in the case before this Court. This case does not present the issue of the admissibility of evidence obtained during the course of a routine supervisory visit by a probationer's own probation agent to the probationer's home, which type of visit is arguably not a

search at all (See: *Wyman* v. *James*, 400 U.S. 309, 27 L.Ed.2d 408, 91 S.Ct. 381 (1971)) and in any event is clearly both minimally intrusive and directly related to a probation agent's supervisory function. Nor does this case present the issue of the admissibility of evidence obtained in a warrantless search at a probation revocation proceeding.

What this case does present is a full-blown search of a probationer's home for the explicit purpose of obtaining evidence of the commission of a crime, which is then used in a criminal prosecution of the probationer. The search was based upon information provided by the police to the probation supervisor, at the instigation of the police, and not the probation supervisor. Having received this unsolicited information from the police, the probation supervisor, without making any attempt to corroborate the information, organized a search of probationer's home, enlisting the assistance of the police to do so. Once the evidence was found, the probation officer both turned the evidence over to the police and had the police arrest petitioner, and this evidence formed the basis of the criminal prosecution of petitioner.

The question then becomes: What is there about the nature of probation that should allow a warrantless, preplanned search of a probationer's home for the specific purpose of obtaining evidence of the commission of a crime, so that that evidence may be used to support a criminal prosecution of the probationer? In searching for the answer to this question, it is well to remember that:

> The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit. It requires that the authorities must obtain a warrant before conducting a full-scale search. The undifferentiated governmental interest

in law enforcement is insufficient to justify an exception to the warrant requirement. Rather, some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement. For the most part, special governmental needs sufficient to override the warrant requirement flow from "exigency"—that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. See *United States* v. *Place*, *supra*, at 701-702, 77 L.Ed.2d 110, 103 S.Ct. 2637; *Mincey* v. *Arizona*, *supra*, at 393-394, 57 L.Ed.2d 290, 98 S.Ct. 2408, *Johnson* v. *United States*, *supra*, at 15, 92 L.Ed. 436, 68 S.Ct. 367. Only after finding an extraordinary governmental interest of this kind have we—or ought we—engage in a balancing test to determine if a warrant should nonetheless be required.

> *T.L.O.*, *supra*, 469 U.S. at 356 (Brennan, J., dissenting) [emphasis in original]

To the extent that the decision of the Wisconsin Supreme Court focuses simply upon the social desirability of permitting the search of petitioner's residence without obtaining a warrant, it misses the point. The question is not whether allowing a search of a probationer's residence is a good idea, but rather, whether there is some reason why that search should be allowed to proceed *without having first been authorized by a neutral and independent magistrate*. The exceptions which this Court has made to the normal warrant requirement rest upon the conclusion that if the search is to fulfill its purpose, time is of the essence, and requiring the searcher to take the time to obtain a warrant would thereby frustrate the purpose of the search. Thus, when the purpose of the search is to catch a fleeing felon who is being closely pursued, to obtain evidence which by its very nature is evanescent and will disappear after the passage of a brief

period of time, or to provide assistance to persons in imminently life-threatening situations, this Court has not required that the searcher first take the time to obtain a warrant before performing the search.

The case before this Court presents none of these considerations. There is nothing about being on probation which *per se* creates exigency, nor do the facts of this case demonstrate that exigent circumstances existed. In the absence of exigency, it is difficult to understand how it is that the imposition of the normal warrant requirement would have frustrated the search contemplated by the probation supervisor and his cohorts. Search warrants are routinely applied for *ex parte*, so that obtaining the warrant provides no warning to the subject of the search that the search is about to commence. The small amount of time it would have taken for the probation supervisor to see a judge, or to talk to a judge by telephone,[2] to obtain the search warrant would have been of no consequence to the ultimate success of the search. While probation officers would undoubtedly find it more convenient not to have to go through the warrant procedure, mere administrative convenience is not, and cannot be, sufficient justification for removing the normal protections of the warrant requirement.

If truly exigent circumstances did exist, the already existing exceptions to the warrant requirement would justify prompt and warrantless action by a probation officer. In the absence of exigent circumstances, there is simply no other justification for doing away with the warrant requirement, when the search which is contemplated

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[2] Wisconsin allows obtaining a search warrant upon telephone, radio or other means of electronic communication. Wis. Stat. § 968.12(3).

is that of a probationer's home for the purpose of obtaining evidence of the commission of a crime, to be used in a criminal prosecution of the probationer.

Numerous federal and state courts have arrived at the same conclusion. *United States* v. *Rea*, 678 F.2d 382 (2nd Cir. 1982); *United States* v. *Bazzano*, 712 F.2d 826 (3rd Cir. 1983) (*en banc*); *United States* v. *Hallman*, 365 F.2d 289 (3rd Cir. 1966); *United States* v. *Workman*, 585 F.2d 1205 (4th Cir. 1978); *United States* v. *Bradley*, 571 F.2d 787 (4th Cir. 1978); *State* v. *Fogarty*, 610 P.2d 140 (Mont. 1980); *Commonwealth* v. *Brown*, 361 A.2d 846 (Penn. 1976); *Commonwealth* v. *Berry*, 401 A.2d 1230 (Penn. 1979); *State* v. *Culbertson*, 29 Or.App. 363, 563 P.2d 1224 (1977); *Tamez* v. *State*, 534 S.W.2d 686 (Tex. 1976); *Croteau* v. *State*, 330 So.2d 577 (Fla. 1976); *State* v. *Cullison*, 173 N.W.2d 533 (Iowa 1970).

Several relevant themes can be distilled from these cases.

The first is that:

> Although a probationer is subjected to conditions of probation which generally tend to diminish his otherwise valid expectations of privacy from intrusion by governmental authorities, a probationer "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Rea*, *supra*, 678 F.2d at 386 (citations deleted).

See also: *Bradley*, *supra*, 571 F.2d at 787, fn. 2. Thus, the appropriate starting point of the analysis is not that a probationer, by virtue of that status, is deprived of all constitutional protections, so that the government may then grant back to him those which it deems appropriate; rather, a probationer retains all of the normal constitutional protections of any other citizen, and can be

deprived of any of them only upon a showing by the government that such a deprivation is necessary to effect the purposes of probation.

Second, these cases recognize that the issue of whether a warrant is required is analytically distinct from the issue of the particular quantum of evidence upon which the search must be based and from any issue of the social desirability or administrative necessity of conducting the search in question. See: *e.g.*, *Bradley, supra*, 571 F.2d at 788, fn. 1 (probable cause to search conceded, but not determinative of the question of the applicability of the warrant requirement).

Finally, these cases apply the correct methodology in analyzing the issue of whether the warrant requirement should apply, by specifically addressing the proper question, which is whether requiring a warrant would frustrate the purposes of the search. These courts have been unanimous in agreeing that it would not. As explained by the Court of Appeals for the Fourth Circuit:

> The first issue is whether a probation officer can conduct warrantless searches of his probationer's premises whenever he has probable cause. Relying primarily on *United States* v. *Bradley*, 571 F.2d 787 (4th Cir. 1950), we conclude that he cannot.
>
> In *Bradley*, we held "that unless an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer." 571 F.2d at 789. We also ruled that the special relationship between a parolee and his parole officer and society's interest in close supervision of the parolee serve to lower the standard of determining probable cause to obtain a search warrant but

that they do not eliminate the warrant requirement. This approach is consistent with the Supreme Court's admonition that exceptions to the warrant requirement "are few in number and careful delineated . . .; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction." *United States* v. *United States District Court*, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972).

We recognize the similarity between searches by probation officers and administrative searches by officials to enforce civil regulations. But as we made clear in *Bradley*, this analogy affords no reason for dispensing with a warrant. This conclusion has been buttressed by *Marshall* v. *Barlow's, Inc.* 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); in which the Court declared unconstitutional a provision of the Occupational Safety and Health Act which authorized warrantless searches of commercial premises by safety inspectors. In that case, the Court reaffirmed the important function served by warrants even when probable cause in the criminal sense is not required to obtain them.

The restriction on a probation officer's authority to search does not preclude warrantless visits to the probationer's home or place of employment. Inherent in the probation officer's duty to "use all suitable methods . . . to aid probationers and to bring about improvements in their conduct and condition" is authority to visit the probationer. A visit, however, is not a search. *Cf. Wyman* v. *James*, 400 U.S. 309, 317-18, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971); *Latta* v. *Fitzharris*, 521 F.2d 246, 256 (9th Cir. 1975) (Hufstedler, J., dissenting).

Nor does the lack of authority to conduct a warrantless search prohibit a probation officer from acting as any other officer in exigent circumstances. Thus he may search and seize articles as an incident to a lawful arrest. *Martin* v. *United States*, 183 F.2d

436 (4th Cir. 1950). Since his authority to visit places him lawfully in the probationer's home, he can seize contraband and instruments or evidence of crime in plain view. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-73, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). For his own safety, he can frisk the probationer without consent, and he can conduct a search with consent. *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Although probation officers have been accorded broad authority so they may effectively discharge their duties, *Bradley* and *Martin* establish that they must obtain search warrants in the absence of recognized exceptions to the requirements of the fourth amendment. We find in this case no occasion for departing from the precedent of those decisions.

Workman, *supra*, 585 F.2d at 1207, 1208 (footnotes deleted)

The analysis in *Workman*, *supra*, is direct and to the point. As that Court stated, if the goal to be achieved is the routine supervision of a probationer, routine home visits without warrants are clearly permissable, and if such a visit were to turn up evidence of the commission of a crime, it could be seized by the probation agent under currently existing exceptions to the warrant requirement. Similarly, if exigent circumstances exist, already existing exceptions to the warrant requirement would allow the probation agent to take prompt and warrantless action. However, when the emphasis swings from supervision to a full-scale search designed specifically to uncover evidence of the commission of a crime, for which a probationer will then be prosecuted, there is simply no reason not to require the probation agent to first obtain a warrant; all of the reasons for which this Court has so carefully established and firmly protected the warrant

requirement apply with equal force to probationers as to all other citizens. In clear accord is the Court of Appeals for the Second Circuit:

> It does not appear to this Court that requiring a probation officer to obtain a warrant prior to searching a probationer's home would interfere in any significant way with the dual rehabilitative and law enforcement functions of the probation officer. The established exceptions to the warrant requirement obviously would allow warrantless searches under specifically delineated circumstances. Further, a probation officer does not need a warrant to visit the home of a probationer. See *Diaz* v. *Ward*, 506 F.Supp. 226, 228-29 (S.D. N.Y. 1980); cf, *Wyman* v. *James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971). Thus, a probation officer is entitled to conduct a warrantless search in those circumstances in which a police officer may conduct such a search, with the advantage that the probation officer can enter the probationer's home without a warrant in order to make supervisory visits.

In *Latta* v. *Fitzharris*, 521 F.2d 246 (9th Cir.), cert denied, 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975), the Ninth Circuit reached a decision which is contrary to that reached here. Our view is more consonant with the reasoning set out by Judge Hufstedler in her dissent in that case. As she points out, indiscriminate searchers are likely to determine, rather than advance, the rehabilitative goals of the probation system. Id. at 258.

We are unaware of any means, other than a warrant requirement, by which the right to be free of unreasonable searches can be effectively protected. "[A]buse of discretion is more easily prevented by prior judicial approval than by *post hoc* judicial review." *United States* v. *Bradley*, 571 F.2d 787, 790 (4th Cir. 1978)

Rea, supra, 678 F.2d at 387.

In an exceptionally lucid exposition of this argument, the Pennsylvania Superior Court has stated that:

> The basis for holding that a parolee has diminished Fourth Amendment rights is the necessity for an agent to have free access to supervise the parolee. Society has an interest - both for its protection and to effectuate rehabilitation - to facilitate such supervision. We, therefore, agree that when performing his normal duties, a parole agent is not required to obtain a search warrant. We are, however, cognizant of another distinction cited in relevant case law: once a parole agent involves the police in the aearch and arrest of a parolee, upholding the search permits the police to circumvent the warrant requirement in what in reality is the normal function of the police. "The parole agent's physical presence, even his nominal conduct of the physical acts of search, does not signalize validity. *The purpose of the search, not the physical presence of a parole agent, is the vital element." That is, once the rationale that justifies the informal treatment of parolees ceases, the parolee's Fourth Amendment rights must be given full consideration. Brown, supra*, 361 A.2d at 849, 850 (footnote and citations deleted, emphasis added)

According full Fourth Amendment protection to probationers in the context of searches conducted for the purpose of obtaining evidence of crime to be used in a criminal prosecution takes on additional significance in light of the fact that many probationers, such as petitioner, share their residence with family or friends. A search of the probationer's residence therefore implicates not only the probationer's privacy interests, but also those of the innocent third parties residing with the probationer. Allowing warrantless searches will force these innocent third parties to the choice of either ceasing to live with probationer

or forfeiting their own Fourth Amendment rights. There is neither legal justification nor practical need to force these innocent third parties to confront this Hobson's choice. As the Montana Supreme Court has stated:

> We recognize that probationary status can and should carry with it a reduced expectation of privacy. But a probationer is living within society, not confined to a penal institution. If the trial courts do not and will not recognize this fundamental fact of life, it then devolves upon this Court to do so. We must fashion a formula, however imperfect, which reasonably balances the competing rights of society and of the individual probationer and his family and friends. *A search of a probationer's home cannot avoid invading the privacy of those with whom he may be living, whether they be immediate family, other relatives, or friends. Probationary status does not convert a probationer's family, relatives and friends into "secondclass" citizens.*
>
> *Fogarty, supra*, 610 P.2d at 151 [emphasis added]

The Montana Court went on to state that:

> Post search review of the reasonableness of a search is hardly an effective deterrent where the rights of third persons are concerned. A determination that a warrantless search of a probationer's home was unreasonable provides no protection for third persons whose privacy has already been invaded by the search itself. The invasion has occurred; the damage has been done. Recognition of this fundamental problem is one of the reasons the Court in *Latta* v. *Fitzharris* (9th Circuit 1975), 521 F.2d 246, imposed a search warrant requirement. Clearly, therefore, so that the legal interests of innocent third persons can be adequately protected and considered in the probationary process, we require that a search warrant first be obtained, and it must be based on probable cause.

Fogarty, supra, 610 P.2d at 152.

The factors deemed determinative in *Fogarty, supra*, are equally present in the case before this Court. The record in this case demonstrates that petitioner was living with another person and their mutual child at the time of the search, that that living arrangement had been in existence for more than a year, and that the probation authorities must have been aware of that fact, since petitioner included it in his regular monthly reports. The warrantless search of petitioner's residence violated not only petitioner's privacy, but that of the persons who lived with him.

This Court has adamantly refused to sanction any dilution of the Fourth Amendment protections surrounding the foremost bastion of privacy in our society, a person's own home. In doing so, this Court has rejected arguments based upon serious public policy concerns, such as the desire to apprehend felons, *Payton, supra*, the need to remove from highways persons who have been operating under the influence of intoxicants, *Welsh, supra*, and the need to investigate the scene of a murder, *Mincey, supra*. There are no sound reasons why a special exception to the warrant requirement should be made for probationers, and there are compelling reasons not to adopt such a rule.

Probationers are citizens, and no citizen's constitutional rights should be taken away from him or her in the absence of some truly compelling reason. Neither the rehabilitative nor the public protection aspects of probation justify or require stripping a probationer of his right to be free of warrantless intrusions by government officials into his home. The essential rehabilitative aspect of probation is that the probationer remains in the community and participates in the life of that community as an ordinary citizen, subject only to such constraints on his

freedom as are necessary to insure that supervision is maintained, rehabilitation is fostered, and legitimate concerns for public safety are satisfied. The whole point of probation is to induce the probationer to learn to live responsibly within the community. The restrictions which are placed upon a probationer are not for the purpose of punishment, but for the purpose of monitoring and directing the probationer's progress toward that goal. Gratuitous deprivations of a probationer's freedoms, particularly the fundamental freedom of privacy in one's own home, have the effect of making the probationer into a second class citizen, which is detrimental to the ultimate goal of inducing the probationer to accept and internalize normal societal values and standards of behavior.

This effect is aggravated by the fact that there is simply no legitimate public safety reason for allowing searches of a probationer's residence without the benefit of a warrant. As stated above, if a true emergency situation exists, currently accepted exceptions to the warrant requirement would justify the warrantless search of the probationer's home. If exigent circumstances do not exist, the minimal administrative inconvenience involved in obtaining a warrant is greatly outweighed by the concern embodied in the United States Constitution for protecting all citizens from unreasonable invasions of the privacy of their homes by government officials, which the warrant requirement fulfills by interposing a neutral and detached magistrate in the process. The need for this sort of protection is particularly strong with probationers, since as a practical matter their liberty continues at the sufferance of their probation agent, and they are peculiarly vulnerable to, and powerless to resist, unreasonable or overreaching conduct on the part of government officials.

Unreasonable searches that yield nothing incriminating do not surface in parole review proceedings or in

> the criminal courts, and it will be a very brave or very foolhardy parolee who attempts to vindicate his Fourth Amendment rights by suing his parole officer . . . even if he has the financial wherewithal to do so.
>
> *Latta* v. *Fitzharris*, 521 F.2d 246, 258 (Hufstedler, J., dissenting, fn. omitted)

In addition, removal of the warrant requirement invites abuse by the police, which is precisely what occurred in this case. It is clear from the record that it was the police department which contacted the probation supervisor and volunteered the information that petitioner "may have a gun" in his residence. This information came from an anonymous source, whose reliability and credibility was unknown, and was accompanied by no substantiating or corroborating information whatsoever. Even under the "totality of the circumstances" standard for the obtaining of a warrant set forth in *Illinois* v. *Gates*, 462 U.S. 213 (1983), this unsubstantiated, unattributed, and wholly conclusory statement would obviously be insufficient to justify the issuance of a search warrant, had that information been presented by the police to a neutral and detached magistrate. See *Gates*, *supra*, 462 U.S. at 239.

Instead of attempting to get a search warrant, the police forwarded the information to the probation supervisor, who later called the police back in to provide "protection" during the search of petitioner's residence. The police participated in that search beyond their supposed "protective" capacity, and in fact it was a police officer who first discovered the gun in question. At that point, the police arrested petitioner, and the evidence obtained as a result of the search was turned over to the police, whereupon it was used to prosecute petitioner.

By this simple subterfuge, the police accomplished indirectly that which they could never have accomplished

directly, namely, the warrantless search of petitioner's home and the use of the fruits of that search against him in a criminal proceeding. The whole purpose of the warrant requirement is to prevent this sort of conduct on the part of government agents, by requiring prior approval of their actions by a neutral and detached magistrate. Removing the warrant protection from probationers will only encourage the repetition of the events which occurred in the case before this Court.

III. THE SEARCH OF A PROBATIONER'S HOME MUST BE BASED UPON PROBABLE CAUSE, REGARDLESS OF WHETHER A WARRANT IS REQUIRED

As discussed *supra*, the warrant requirement and the probable cause requirement of the Fourth Amendment serve very different purposes. Under the explicit language of the Fourth Amendment, if a warrant were required for the search of petitioner's residence, that warrant would have to be based upon probable cause. Even assuming *arguendo* that a warrant was not required, this does not automatically mean that probable cause was not required to justify the search of petitioner's residence. This Court has consistently held that, even if an exception to the warrant requirement exists, a search must still be based upon probable cause. *Dunaway* v. *New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248; *Chambers* v. *Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). The only exception to the probable cause requirement has been for those categories of searches which were substantially less intrusive than full-scale searches or seizures, and for which a balancing test was used to justify a lesser standard than probable cause. See, *e.g.*, *Terry* v. *Ohio*, *supra*; *Dunaway*, *supra*; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975).

The justification given for allowing these exceptions to the probable cause requirement has consistently been that these types of encounters, such as traffic stops, "stop and frisks," and border stops, are so brief and minimally intrusive that they are not full-scale "searches" at all, as that term is used in the Fourth Amendment. Therefore, this Court has concluded that the lesser standard of "reasonable suspicion" will suffice to protect the lesser individual privacy interests which are infringed upon by such "searches."

In contrast to those situations, the case before this Court involves a pre-planned, room-by-room search of petitioner's entire residence. There is no place in which a person's expectation of privacy is higher than inside his own home, and there is no governmental invasion of a person's privacy interest which is more substantial than the search of his home. The Wisconsin Supreme Court, by applying a standard devised by this Court to permit the most innocuous government intrusions on a person's privacy to justify what this Court has long recognized as being the most significant possible invasion of a person's privacy, has turned this Court's jurisprudence on its head. This Court's prior decisions clearly mandate that a full-scale search of a person's home cannot be based on anything less than the traditional standard of probable cause.

This Court's recent decision in *T.L.O.*, *supra*, does not lead to a different result. In *T.L.O.*, *supra*, this Court held that the search of a student's purse may be based upon reasonable suspicion, as opposed to probable cause. Initially, it is worth noting that this aspect of the *T.L.O.*, *supra*, decision resulted in a sharply divided Court. The three dissenters rejected this holding outright, and a fourth member of the Court, Justice Blackmun, concurring in the Court's judgment, expressed extreme concern over the possibility of the Court's holding being applied to situations other than the narrow issue of school searches which was before the Court in *T.L.O.*, *supra*. Justice Blackmun stressed that:

> Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers [of the Fourth Amendment] *T.L.O.*, *supra*, 469 U.S. at 351 (Blackmun, J. concurring).

Finally, two other members of the Court, Justices Powell and O'Connor, while concurring in the Court's decision, and generally with its opinion, went to great pains to set forth what they viewed as the special characteristics of elementary and secondary schools which justified the Court's decision. In doing so, they stressed the diminished expectation of privacy which a student might expect while attending a public institution such as a school, the fact that a public school is open and subject to close community interest and scrutiny, thereby providing an independent protection for the rights of students, the fact that immediate on-the-spot responses to disciplinary violations are essential to the primary function of a school, which is of course the education of its students, and most significantly for the case before this Court, the fact that the student-teacher relationship is non-adversarial, unlike that between law enforcement officers and persons suspected of crime.

Petitioner shares the concerns of the dissenters in *T.L.O.*, *supra*, regarding the abrogation of the normal probable cause requirement. Justice Brennan's dissenting opinion constitutes an eloquent and cogent argument in favor of maintaining the traditional probable cause

requirement for full-scale searches. It is obviously familiar to the members of this Court, and petitioner will not repeat it here.

The concerns of the aforementioned three concurring Justices regarding the uniqueness of the fact situation before the Court in *T.L.O.*, *supra*, suggest that its holding cannot be mechanically applied to situations other than that in which it arose. The significant differences between the search which took place in the case before this Court, and that which occurred in *T.L.O.*, *supra*, lend weight to these concerns.

As the result of the law enforcement and crime prevention duties of a probation officer, a probation officer is often in a direct adversarial relationship with his probationer. As discussed *supra*, if the issue were the legitimacy of a mere home visit by a probation agent, as part of a routine supervisory regimen, these adversarial concerns would not arise. Both the minimal intrusiveness of the search and its routine supervisory nature, in connection with which it can at least be assumed that the probation agent has some interest in helping the probationer, combine to justify allowing such a visit on less than probable cause.

However, that kind of "search" is very different from that which gave rise to the case before this Court. In this case, this Court is faced with a search instigated by information provided by police, which was then planned and executed specifically as a search for evidence of the commission of a crime, and which evidence was then used to support petitioner's criminal prosecution. Neither the probation supervisor nor the probation agent who assisted in the search were petitioner's regular probation agent. This was clearly an adversarial search from the

moment of its conception, and it in fact resulted in an adversary proceeding being instituted against petitioner.

While a student, like any other person who goes into a public place, may reasonably be expected to suffer from a reduced expectation of privacy due to the public nature of that place, a person's own home is at the opposite end of the scale when it comes to expectations of privacy. Similarly, while a public school may be open to the public and presumably is subjected to intense public scrutiny, both from parents and from government agencies, the exact opposite is true of a person's residence.

Finally, the need for immediate disciplinary response which was deemed so important by this Court in *T.L.O.*, *supra*, is lacking in this case. As discussed in part II of this Brief, the State has not, and can not, establish that any sort of "exigency" justified the search of petitioner's home.

Thus, the decision in *T.L.O.*, *supra*, badly fragmented as it is, and narrowly limited to its facts as it should be, furnishes no support for the contention that a search of a probationer's residence may be based upon less than probable cause.

It would undoubtedly be more convenient for probation officers if they could search the homes of their probationers on less than probable cause. Requiring probable cause may even deter some probation agents from making such searches. That, however, is not a problem; it is the very reason for existence of the Fourth Amendment. *T.L.O.*, *supra*, 83 L.Ed.2d at 744, 745 (Brennan, J., dissenting) It is the duty of all government agents, including probation officers, not just to detect and prevent crime, but also to protect, and to refrain from violating, the rights of all citizens. *T.L.O.*, *supra*, 83 L.Ed.2d at 749, fn.

5 (Brennan, J., dissenting) Probationers are citizens. There is no basis in this Court's decisions, and there is no compelling reason, to deprive probationers of the same Fourth Amendment protections enjoyed by all other citizens, including the probable cause requirement explicitly embodied in the language of the Fourth Amendment.

IV. THE INFORMATION UPON WHICH THE SEARCH OF PROBATIONER'S RESIDENCE WAS BASED WAS NOT SUFFICIENT TO MEET THE STANDARD OF PROBABLE CAUSE, OR EVEN OF REASONABLE BELIEF

The record in this case demonstrates that the sole basis for the search of probationer's home was an anonymous tip to the effect that petitioner may have had a gun in petitioner's residence. This tip was provided by a completely unidentifiable source, whose reliability and credibility was unknown and unknowable. Even the police officer who allegedly received the tip and passed it on to the probation supervisor remains unidentifiable. There is no way to tell from the record how old the informer's claimed information was, how long the informer had that information in his or her possession before calling the police officer, or even how long the police had the information in their possession before passing it on to the probation supervisor. The tip is completely lacking in any internal corroborating detail. Neither the police nor the probation officers made any attempt whatsoever to corroborate the reliability and credibility of the informer, or the factual accuracy of the claim that petitioner may have had a gun in his residence. For all that the record reveals, the informer's statement could have been founded on nothing more than a hunch, rumor, imagination or malice.

This Court has recently discussed the concept of probable cause, with particular reference to cases depending upon informer's tips, in *Illinois* v. *Gates*, 462 U.S. 213, 76

L.Ed.2d 527, 103 S.Ct. 2317 (1983). While *Gates*, *supra* dealt with probable cause in a warrant, its discussion of probable cause is equally relevant to warrantless searches; if anything, this Court's review of a warrantless search should involve stricter application of the probable cause requirement, given this Court's often expressed preference for searches which are authorized by warrant. In *Gates*, *supra*, this Court stated that the test of probable cause is whether, given all the circumstances, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. *Gates*, *supra*, 462 U.S. at 238. While specifically rejecting mechanical application of particular rules for evaluating probable cause, in favor of a more flexible, totality-of-the-circumstances analysis, this Court warned against taking this analysis beyond the limits previously established in this Court's decisions:

> Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does not believe that" liquor illegally brought into the United States is located on certain premises will not do. *Nathanson* v. *United States*, 290 U.S. 41, 78 L.Ed.2d 159, 54 S.Ct. 11 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. *An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. Aguilar* v. *Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). *As in Nathanson, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information*

> *must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of another.* In order to insure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. *Gates, supra*, 462 U.S. at 239, [emphasis added]

The information possessed by the probation supervisor prior to conducting the search of petitioner's residence falls far short of probable cause. It does not even contain boiler plate allegations that its source was credible and that the information provided was reliable. If a sworn affidavit containing such allegations is insufficient to establish probable cause, then clearly the unsworn, unattributed hearsay information present in the case before this Court is also insufficient.

Even if the standard is reasonable belief, as opposed to probable cause, the result is the same. This Court has stated that the test of reasonable suspicion is whether the facts available at the moment of the search would warrant the belief, in a person of reasonable prudence, that the search was appropriate. *Terry, supra*, 392 U.S. at 21, 22, 27. This is an objective test, and to satisfy it the searching officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry, supra*, 392 U.S. at 21.

Examination of the information upon which the probation officer acted reveals it to be devoid of any facts whatsoever. Its brevity is matched only by its lack of any basis to believe, either through internal or external corroboration, that it had any foundation in fact at all. The probation supervisor could not remember what police officer allegedly passed this information on to him, so that it is

not even possible to tell whether the probation supervisor accurately stated the information which was supposedly transmitted to him by the unknown police officer. Beyond that, the tip from the alleged informant suffers from all of the infirmities discussed *supra*.

The simple truth is that, no matter how low this Court may set the hurdle, the informer's tip in this case cannot clear the bar. If, as the Wisconsin Supreme Court asserted, this tip is sufficient to establish reasonable belief, then the standard of reasonable belief is in fact no standard at all.

Under any standard, it is the government's burden to come forward with a factual basis sufficient to justify the search of petitioner's residence. From the record in this case, it is painfully obvious that no such factual basis existed, and that the search was therefore unreasonable, regardless of the standard it is measured against.

V. CONCLUSION

For the reasons set forth in this Brief, this Court should hold that the search of petitioner's residence violated petitioner's Fourth Amendment rights. This Court should therefore reverse the judgment of the Wisconsin Supreme Court and remand this case to it for the further proceedings which such a reversal requires, namely, the reversal of petitioner's conviction and the entry of an order granting petitioner's motion to suppress the evidence obtained as the result of the search of petitioner's residence.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 86-5324

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH G. GRIFFIN, PETITIONER

v.

STATE OF WISCONSIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a probation officer's warrantless search of a probationer's home is reasonable under the Fourth Amendment where the probation officer has reasonable grounds to suspect a probation violation and the search is authorized by a general regulatory scheme defining the conditions of probation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

Constitution, statutes, regulations and rules:

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INTEREST OF THE UNITED STATES

This case raises an important question concerning the validity under the Fourth Amendment of a probation officer's search of a probationer's house. The United States has a strong interest in the Fourth Amendment standards that apply to searches of federal probationers and parolees.

Federal law authorizes courts to impose "such terms and conditions as the court deems best" when placing a convicted defendant on probation. 18 U.S.C. (& Supp. III) 3651; see 18 U.S.C. (Supp. III) 3563. Pursuant to this authority, federal courts have frequently imposed conditions permitting searches of probationers among the conditions of their probation. See, *e.g.*, *Owens* v. *Kelley*, 681 F.2d 1362 (11th Cir. 1982). Similarly, the United States Parole Commission has authority to impose "reasonable conditions" when placing a prisoner on parole. 18 U.S.C. 4203(b)(2), 18 U.S.C. (& Supp. III) 4209; see *United States* v. *Binder*, 313 F.2d 243 (6th Cir. 1963); *Gould* v. *Green*, 141 F.2d 533 (D.C. Cir. 1944). A decision in this case re-

garding the constitutionality of warrantless searches of probationers and parolees will therefore have a significant impact on the operation of the federal probation and parole systems.

STATEMENT

Petitioner was convicted by a jury in the circuit court of Rock County, Wisconsin, of possession of a firearm by a convicted felon, in violation of Wis. Stat. Ann. § 941.29(2) (West Supp. 1986). He was sentenced to two years' imprisonment. The Court of Appeals of Wisconsin (Pet. App. A13-A24) and the Supreme Court of Wisconsin affirmed his conviction (Pet. App. A1-A12).

1. In 1983 petitioner was on probation for a 1980 conviction for resisting arrest, disorderly conduct, and obstructing an officer. Prior to that offense, petitioner had been convicted of the felony offense of possession of heroin with intent to deliver it. As a convicted felon, petitioner could not possess firearms without thereby committing a further criminal offense. Wis. Stat. Ann § 941.29(2) (West Supp. 1986). As a probationer, petitioner was "in the custody" of the Wisconsin Department of Health and Social Services and subject to the department's regulations (Wis. Stat. Ann. § 973.10 (West 1985 & Supp. 1986)). Those regulations required advance permission before a probationer could obtain a firearm (Wis. Admin. Code HSS § 328.04(3)(j); Br. in Opp. 102) and authorized warrantless searches if there were reasonable grounds to believe the probationer possessed contraband. Firearms constituted contraband for purposes of the regulations, both because petitioner was a convicted felon and because he had not obtained permission to possess a gun (Pet. App. A8 n.7, A9; Br. in Opp. 101-104).

On April 5, 1983, Michael T. Lew, a supervisor in the Bureau of Probation and Parole in Beloit, Wisconsin, received a telephone call from a detective in the Beloit Police Department, informing him that petitioner had or might have guns in his apartment. After waiting two or three hours for petitioner's probation officer, Lew arranged for another probation officer, Joanne Johnson, to accompany him to petitioner's apartment. For their protection, Lew and Johnson were joined by three Beloit police officers. Pet. App. A2.

Upon arriving at the apartment, Lew identified himself and his colleagues and said they were going to search the apartment. Lew and Johnson first searched the bedroom and the kitchen, while the police officers accompanied petitioner and a companion to the living room. The police officers did not participate in the search. In the living room, Lew found a handgun, which he turned over to one of the police officers. Lew then directed the officers to take petitioner into custody for a probation violation. When Johnson entered the living room, she took possession of a substance that appeared to be marijuana, which she had seen on a living room table when she first entered the apartment. Pet. App. A2.

2. Petitioner was subsequently charged both with possession of a firearm by a felon and possession of a controlled substance, THC. The trial court denied petitioner's motion to suppress the evidence obtained in his apartment, ruling that the search did not violate petitioner's Fourth Amendment rights. The court held that a probation officer must act reasonably in conducting a search of a probationer's residence and that the search in this case was reasonable. The court further found that the police officers were present only for the probation officers' protection and that the search was not a police search. See Pet. App. A3.

The Wisconsin Court of Appeals affirmed petitioner's conviction. It concluded that an exception to the warrant and probable cause requirements was justified by virtue of the nature of probation, which imposes on a probationer certain restrictions as conditions on the grant of liberty. Pet. App. A15-A18.

The Wisconsin Supreme Court affirmed the decision of the court of appeals. The court based its holding on a prior Wisconsin case that had noted the limited liberty and privacy interests of probationers, *State* v. *Tarrell*, 74 Wis. 2d 647, 247 N.W.2d 696 (1976). A probationer enjoys only conditional liberty, the court reasoned, and his Fourth Amendment rights are necessarily limited by restrictions that are reasonably related to the dual ends of probation—rehabilitation of the probationer and protection of the public. Pet. App. A6. The court held that the limitations on a probationer's freedom and the responsibility of a probation officer to determine whether the probationer is complying with the terms of his probation justify an exception to the warrant and probable cause requirements of the Fourth Amendment. *Id.* at A5-A7. A probation officer's warrantless search of a probationer's home, the court therefore concluded, is valid as long as it meets the basic Fourth Amendment requirement of reasonableness. *Id.* at A8.

The court then held that the reasonableness test was satisfied by the Wisconsin Administrative Code provision that permits probation officers to conduct warrantless searches on less than probable cause. Pet. App. A7-A9. The regulation (Wis. Admin. Code HSS § 328.21(7); Br. in Opp. 103-104) allows such searches if there are "reasonable grounds to believe" that contraband is present in the probationer's residence. The regulation also sets out guidelines for determining when reasonable suspicion exists. See Pet. App. A8-A9. Applying those guidelines, the court held that the search in this case was not a police

search and that the tip from a police detective provided the required reasonable grounds to justify the search. Pet. App. A9-A10.

Two justices dissented. One dissenter would have required a warrant for the search, but would have authorized the issuance of the warrant on less than probable cause. Pet. App. A10-A11. The other dissenter concluded that the tip from the police detective was not sufficiently reliable to satisfy the regulatory guidelines and therefore did not provide reasonable grounds for the search. *Id.* at A10-A12.

SUMMARY OF ARGUMENT

We agree with the Supreme Court of Wisconsin that the warrantless search of petitioner's residence, conducted on reasonable suspicion of a probation violation, was reasonable under the Fourth Amendment. Although private residences are generally entitled to the protections of both a warrant and probable cause, the "overarching principle * * * embodied in the Fourth Amendment" is one of "reasonableness." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). The Court has accordingly held that a warrantless search on a reduced level of suspicion, or even without any individualized suspicion at all, is reasonable in a variety of contexts, especially where the search is part of a regulatory program rather than an ordinary criminal investigation by law enforcement officers. See, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985); *Donovan* v. *Dewey*, 452 U.S. 594 (1981). Such a search is reasonable where the intrusion on privacy interests is counterbalanced by the governmental interests supporting the search, and the standards governing the search adequately constrain official discretion. Those tests are met in a case such as this one, where probation officers are authorized by a general sentencing and corrections scheme to conduct warrantless searches on reasonable suspicion of a probation violation.

Probationers stand between prisoners and free citizens in the liberty they enjoy, and their legitimate privacy interests should be defined accordingly. By definition, probationers are under criminal sentence. They avoid prison, where Fourth Amendment rights in living quarters are non-existent (*Hudson* v. *Palmer*, 468 U.S. 517 (1984)), only by submitting to numerous conditions of release, designed both to assist in rehabilitation and to protect the public. Those conditions often tightly regulate probationers' lives and subject probationers to close supervision by probation officers, who have a kind of in loco parentis authority over them. Probationers therefore have lesser legitimate privacy interests than members of the general public.

The governmental interests supporting the authority to conduct warrantless searches on reasonable suspicion are closely tied to the purposes of probation and the fact that prison is the alternative to release on probation. Close supervision of probationers may be critical both to their successful rehabilitation and to minimizing the risk that they will engage in conduct that is harmful to society or themselves. The necessary supervision would be impossible in many circumstances if probation officers had to seek a warrant or await the development of full-scale probable cause before exercising their responsibilities to monitor and intervene in probationers' lives. Moreover, many persons convicted of crime would be ill served if sentencing authorities faced the choice between imprisonment and release without the special supervision made possible by a relaxed Fourth Amendment standard. The availability of broad search authority may be the necessary condition for release of convicted defendants who would otherwise be confined in prison.

A reasonable suspicion standard in the probation context meets this Court's concerns that there be adequate constraints on official searching discretion. The probable cause standard is peculiarly appropriate to ordinary crim-

inal investigations (see, *e.g.*, *Colorado* v. *Bertine*, No. 85-889 (Jan. 14, 1987), slip op. 4), and probation officers are not ordinary law enforcement officers engaged in criminal investigations. Rather, they are essentially regulatory officials and are, moreover, at least as concerned for probationers' welfare as for public safety. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 783-784 (1973). Wide discretion is necessary to carry out the oversight functions of the office. A reasonable suspicion standard, when authorized as part of a legislative or administrative scheme for regulating the conduct of criminal offenders not confined in prison, provides an adequate check on the discretion to search.

The search of petitioner's house was conducted pursuant to regulations meeting these standards. Recognizing that the rehabilitative and protective purposes of probation require a relaxed Fourth Amendment standard for probation searches, Wisconsin regulations authorize warrantless searches for contraband, but they permit searches only on reasonable suspicion and they set forth guidelines for determining when such suspicion exists. In this case, a tip from a police detective established reasonable grounds to suspect that petitioner had a gun, and probation officers thus acted reasonably in conducting the search that resulted in its discovery and removal from petitioner's possession.

ARGUMENT

THE PROBATION OFFICERS' SEARCH OF PETITIONER'S RESIDENCE DID NOT VIOLATE THE FOURTH AMENDMENT

A. A Warrantless Search Conducted On Reasonable Suspicion Is Valid In Certain Contexts

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey* v. *T.L.O.*, 469 U.S. at 340. See *United States* v.

Montoya de Hernandez, No. 84-755 (July 1, 1985), slip op. 5; *United States* v. *Villamonte-Marquez*, 462 U.S. at 588. Thus, the Fourth Amendment "does not denounce all searches or seizures, but only such as are unreasonable." *Carroll* v. *United States*, 267 U.S. 132, 147 (1925). The test of reasonableness, moreover, "is not capable of precise definition or mechanical application." *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). Rather, in defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that " 'the specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)). See also *New Jersey* v. *T.L.O.*, 469 U.S. at 337 ("what is reasonable depends on the context within which a search takes place").

In the context of an ordinary investigation of criminal conduct by law enforcement officers, the Court has generally held that both probable cause and a warrant are necessary to render a search reasonable. See *United States* v. *Karo*, 468 U.S. 705, 717 (1984); *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972). In other situations, however, searches have been held reasonable without meeting one or both of those requirements. See *New Jersey* v. *T.L.O.*, 469 U.S. at 340 ("although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, * * * in certain limited circumstances neither is required' " (quoting *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

For example, only "reasonable suspicion" is required for a "stop and frisk" under *Terry* v. *Ohio*, *supra*. See also *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Reasonable suspicion is likewise sufficient to support a search of the passenger compartment of an automobile during an investigative stop. *Michigan* v. *Long*, 463 U.S. 1032 (1983). The Court has also permitted officials to stop cars in the vicinity of the nation's borders and to question their occupants on reasonable suspicion of an immigration violation, *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), as well as to open packages mailed from abroad on reasonable suspicion of illegality, *United States* v. *Ramsey*, 431 U.S. 606 (1977). In addition, the Court has held that school authorities may conduct warrantless searches of school children on reasonable suspicion of an infraction of school disciplinary rules. *New Jersey* v. *T.L.O.*, *supra*.

In still other contexts, the Court has recognized that a warrantless search may be reasonable even in the absence of any individualized suspicion of unlawful conduct. For example, the Court held in *Hudson* v. *Palmer*, 468 U.S. 517 (1984), that a prisoner has no Fourth Amendment rights in the privacy of his cell. In *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976), the Court held that border officials may stop automobiles at permanent checkpoints without any individualized suspicion. The Court has also held that no individualized suspicion is required for the Coast Guard or Customs Service to board a vessel and to examine its owner's documents. *United States* v. *Villamonte-Marquez*, *supra*.

Of special importance to this case, the Court has required neither a warrant nor individualized suspicion for certain "administrative" searches—searches conducted as part of a regulatory program designed to ensure compliance with regulatory requirements. Thus, a warrantless entry to inspect premises, without any particularized suspicion, is permitted if it is authorized by a legislative scheme for pervasively regulated industries. *Donovan* v. *Dewey*, *supra* (inspection of mines); *United States* v. *Biswell*, 406 U.S.

311 (1972) (gun dealers); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (alcohol dealers). For similar reasons, a welfare caseworker may enter the home of a welfare recipient in order to ensure compliance with welfare rules. *Wyman* v. *James*, *supra*. Even police officers need not obtain a warrant or have particularized suspicion when they perform various non-criminal "administrative caretaking functions" (*South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976)), such as searching impounded objects to take inventory pursuant to routine procedures, *Colorado* v. *Bertine*, *supra*; *Illinois* v. *Lafayette*, 462 U.S. 640 (1983); *South Dakota* v. *Opperman*, *supra*, or searching a car for the service revolver of an off-duty officer, *Cady* v. *Dombrowski*, 413 U.S. 433 (1973). See also *Harris* v. *United States*, 390 U.S. 234 (1968) (officer discovered evidence while locking an impounded car).

In short, the Court has repeatedly recognized that the Fourth Amendment requirement of "reasonableness" sets different standards in different contexts. Especially outside the context of an ordinary criminal investigation, the probable cause and warrant requirements are often unsuited to fulfilling the purpose of the Fourth Amendment—to impose a limit of " 'reasonableness' upon the exercise of discretion by government officials" in order to protect individuals against arbitrary government invasions. *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979). Accordingly, the Court has carefully examined the unique features of each context in deciding the appropriate test of reasonableness to be applied in that context.

The Court has articulated a balancing test to govern this inquiry. "The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *United States* v. *Montoya de Hernandez*, slip op. 5 (quoting

United States v. *Villamonte-Marquez*, 462 U.S. at 588). See also *Delaware* v. *Prouse*, 440 U.S. at 654; *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). This approach recognizes that not every invasion of privacy is prohibited by the Fourth Amendment, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals" (*United States* v. *Martinez-Fuerte*, 428 U.S. at 554). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard" (*New Jersey* v. *T.L.O.*, 469 U.S. at 341).

In examining a particular search practice in light of the degree of intrusion on privacy interests it allows and the strength of the governmental interest supporting it, the Court has often found a third consideration important—the amount of discretion left to the officials carrying out the search. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. at 601-604; *Delaware* v. *Prouse*, 440 U.S. at 654, 661; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). See also *Colorado* v. *Bertine*, slip op. 1 (Blackmun, J., concurring). Because the constitutional constraint on discretion is simply one of "reasonableness" (*Delaware* v. *Prouse*, 440 U.S. at 654), the means needed to confine searching discretion adequately vary from context to context. What is required to meet the constitutional concern for controlling discretion depends on the strength of the governmental interests in a particular search practice and the impairment of privacy interests that the practice effects.

B. A Probation Officer May Conduct A Warrantless Search In Circumstances Such As Those In This Case

We note at the outset that there is no challenge in this case, nor could there reasonably be, to the authority of probation officers to conduct "home visits" at proba-

tioners' residences. See 18 U.S.C. (Supp. III) 3563(b)(17) (probationer must "permit a probation officer to visit him at his home or elsewhere as specified by the court"). Indeed, petitioner concedes (Br. 25) that a home visit is valid under the Fourth Amendment. As petitioner observes, such home visits are "clearly both minimally intrusive and directly related to a probation agent's supervisory function" (*ibid.*). Accordingly, we think it clear that probation officers, in fulfilling their supervisory responsibilities, may constitutionally conduct routine or unscheduled home visits without a warrant or any grounds for suspecting a violation of a condition of probation. See *Wyman* v. *James, supra; United States* v. *Rea*, 678 F.2d 382, 387 (2d Cir. 1982); *United States* v. *Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978); 4 W. LaFave, *Search and Seizure* § 10.10(c), at 142-144 (2d ed. 1987) [hereinafter cited as LaFave].

This case requires the Court to determine whether the Fourth Amendment permits the additional intrusion of a full-scale search of the probationer's home, at least when the search is conducted by probation officers having reasonable suspicion of a probation violation, and when the search is authorized by a general legislative sentencing and corrections scheme. We think it does. We recognize that private residences are "ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. at 561. But the Fourth Amendment standards are relaxed in a context "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served" by doing so. *New Jersey* v. *T.L.O.*, 469 U.S. at 341.

In the unique context of probation or parole, it is reasonable under the Fourth Amendment for a state to authorize warrantless searches on reasonable suspicion. Probationers and parolees are permitted to be at large only on numerous conditions and under supervision aimed at

rehabilitation of the individual and protection of the public. At least where, pursuant to an overall statutory scheme for sentencing and corrections, it is determined that warrantless searches on reasonable suspicion are necessary to serve these correctional goals, that lower standard of Fourth Amendment protection is a reasonable condition of freedom from confinement.[1]

1. *Probationers have lesser legitimate privacy interests than persons not under criminal sentence*

A probationer has been convicted of a crime and is therefore legitimately subject to a variety of deprivations of liberty. For that reason, the degree of privacy that a probationer may legitimately expect cannot be determined by reference to the privacy rights of the population at large. Rather, it must be judged by reference to the legally authorized treatment of convicted offenders and, more particularly, the character and purposes of probation as "an established variation on imprisonment of convicted criminals." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972); see *Gagnon* v. *Scarpelli*, 411 U.S. at 783-784.[2]

To begin with, release on probation is a substitute for imprisonment. *E.g.*, 18 U.S.C. (& Supp. III) 3651 (judge may substitute probation for some or all of prison sentence); Wis. Stat. Ann. § 973.09 (West 1985 & Supp. 1986); 18 U.S.C. (Supp. III) 3563(b)(11) and (12) (court

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[1] There may be other circumstances where a warrantless probation search is constitutionally reasonable. We argue only that the standards met in this case are sufficient to satisfy the Fourth Amendment, not that all are necessary for constitutional validity.

[2] For purposes of the Fourth Amendment analysis in this case, we think there is no significant difference between probationers and parolees, both of whom enjoy a conditional liberty authorized by a system of post-conviction treatment of criminal offenders and both of whom may serve time in prison prior to their release into this distinctive status. See *Gagnon* v. *Scarpelli*, 411 U.S. at 782; LaFave 138 & n.49. Throughout this brief, we occasionally discuss parole as well as probation, and we draw on cases from both areas.

may require probationer to report to prison for nights, weekends, or other intervals of time; court may also require residence at a community correctional facility). If the probationer were in prison, he would have no Fourth Amendment protection at all against searches of his living quarters—that is, his cell. *Hudson* v. *Palmer, supra.* It is therefore unreasonable for a probationer to expect that, when a court has exercised its discretion to release rather than imprison him, his living quarters must remain free from any government scrutiny other than that applicable to members of the general public.[3]

Recognizing that prison is the alternative to probation, some states, such as Wisconsin, treat a probationer as being in "custody." Wis. Stat. Ann. § 973.10 (West 1985 & Supp. 1986). See also *United States* v. *Thomas*, 729 F.2d 120, 123 (2d Cir.), cert. denied, 469 U.S. 846 (1984) (a "parolee is in the legal custody of a parole officer"); LaFave 129 & n.11. Even where that label is not used, however, it is generally recognized that probation places the probationer in a kind of ward status. The probation officer "stands substantially *in loco parentis* or in the position of a guardian to a ward, one with a history of fractiousness or worse." *United States* v. *Scott*, 678 F.2d 32, 34 (5th Cir. 1982) (parole). See also *Latta* v. *Fitzharris*, 521 F.2d 246, 249 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975) (parole); *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 265-266 (9th Cir. 1975) (en banc) (probation). This status, with the diminished independence and autonomy it entails, follows from the character

[3] This is not to suggest that a probationer is constructively in prison and can be treated accordingly. The rule of *Hudson* v. *Palmer, supra*, is based on the special need for maintaining order in the prison, and that need is not relevant to probation. As we explain, however, related governmental interests do support an intermediate standard for what constitutes a reasonable probation search. We suggest here both that the looming potential of confinement and the fundamental fact of being under criminal sentence substantially color a probationer's expectation of privacy.

of probation as a means of promoting rehabilitation without imprisonment. As this Court said in *Roberts* v. *United States*, 320 U.S. 264, 272 (1943), "the basic purpose of probation * * * [is] to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity." Being subject both to "the tutelage of a probation official" and to the power to be imprisoned, a probationer cannot reasonably have an ordinary free citizen's expectation of privacy.

Any expectation of full privacy protection would be unreasonable in light of the wide range of impairments of freedom to which probationers have long been subjected. For example, the federal probation statute authorizes (and in certain circumstances demands) the imposition of conditions requiring probationers not only to obey the law and to pay fines or make restitution, but also to pursue employment, refrain from certain occupations, avoid certain places or people, undergo certain medical or psychological treatment, submit to prison custody at night or on weekends, attend or live at a community corrections facility, work in community service, reside at or avoid specified places, seek permission before leaving the jurisdiction, permit home visits, and answer questions by and report to their probation officers. 18 U.S.C. (Supp. III) 3563. Moreover, under the catchall authorization provision (18 U.S.C. (Supp. III) 3563(b)(20) (probationer must "satisfy such other conditions as the court may impose")), the courts have imposed conditions affecting a wide range of conduct. Much of that conduct, like much of the conduct restricted by the conditions specifically enumerated in the statute, involves activities that are

ordinarily constitutionally protected. See *United States* v. *Tonry*, 605 F.2d 144, 151 (5th Cir. 1979); *United States* v. *Consuelo-Gonzalez*, 521 F.2d at 264-265.[4]

There is, to borrow from the administrative search cases, "a long tradition of close government supervision, of which any person * * * [who becomes a probationer] must already be aware" (*Marshall* v. *Barlow's, Inc.*, 436 U.S. at 313). With respect to numerous aspects of a probationer's life, the "regulatory presence is sufficiently comprehensive and defined" (*Donovan* v. *Dewey*, 452 U.S. at 600) that any claim to full privacy protections would be unreasonable.

Not only has there long been pervasive regulation of probationers' conduct generally, but the courts have widely held that probationers have diminished Fourth Amendment privacy rights against searches.[5] The traditional restrictions on probationers' privacy interests suggest that the actual expectation of privacy is less than that of persons who have not been convicted of crime. It also indicates that the normal expectation of privacy is not one

[4] The same kinds of limitations are routinely imposed as conditions of parole. See 28 C.F.R. 2.40 (enumerating conditions of release); *Morrissey* v. *Brewer*, 408 U.S. at 478 (parole restrictions common on, *e.g.*, liquor use, association with certain persons, employment, residence, marriage, traveling, owning or driving a car, borrowing money).

[5] *E.g.*, *Owens* v. *Kelley*, 681 F.2d at 1366-1368; *United States* v. *Scott*, 678 F.2d at 35; *United States* v. *Consuelo-Gonzalez*, 521 F.2d at 265-266; *United States ex rel. Santos* v. *New York State Board of Parole*, 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972); *People* v. *Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986); *State* v. *Fields*, 67 Hawaii 268, 686 P.2d 1379, 1387-1390 (1984); *State* v. *Velasquez*, 672 P.2d 1254, 1258-1261 (Utah 1983); *People* v. *Huntley*, 43 N.Y.2d 175, 371 N.E.2d 794, 401 N.Y.S.2d 31 (1977). See also LaFave 127-128 ("weight of authority" favors diminished Fourth Amendment protections for parolees and probationers).

that "society is prepared to recognize as 'reasonable' " for probationers (*Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

In sum, the special character of a probationer's status, the long history of close government regulation of probationers' lives, and the widespread recognition that probationers are afforded lesser protections under the Fourth Amendment than persons who are not under criminal sentence all suggest that probationers have a diminished legitimate expectation of privacy, at least against searches by those who are responsible for their supervision. A search of a probationer's house by probation officers thus works a less serious invasion of legitimate privacy interests than the ordinary house search does. The severity of the intrusion is further reduced if the probationer is informed of the authority to search sufficiently in advance of the search itself—for example, at the outset of the period of probation or through the promulgation of search regulations. See LaFave 141.

2. There is a strong public interest in permitting probation officers to conduct warrantless searches on reasonable suspicion as a condition of probation

Probation, as an alternative to imprisonment, is designed " 'to help individuals reintegrate into society as constructive individuals as soon as they are able * * *.' " *Gagnon* v. *Scarpelli*, 411 U.S. at 783 (quoting *Morrissey* v. *Brewer*, 408 U.S. at 477). See also *Roberts* v. *United States*, 320 U.S. at 272 (probation gives offender "opportunity to rehabilitate himself without institutional confinement"). The probation laws, however, subject probationers to conditions not just to aid in their rehabilitation, but also to protect society against them. See, *e.g.*, 18 U.S.C. (Supp. III) 3563, 3553(a)(2). It has thus been widely recognized that the central purposes of probation are both "the rehabilitation of the probationer, and the pro-

tection of society." *Owens* v. *Kelley*, 681 F.2d at 1367; see *United States* v. *Consuelo-Gonzalez*, 521 F.2d at 264.[6]

A critical aim of the conditions imposed on probationers is to prevent the probationer from committing further crimes, both for his own good and for that of society. Refraining from further criminal conduct is the single condition of probation that appears to be universally recognized. See, *e.g.*, 18 U.S.C. (Supp. III) 3563, 3553(a)(2). Close supervision of the probationer is obviously necessary to further that aim by preventing all criminal conduct on the probationer's part, not just conduct of the type involved in the conviction underlying the probation. As one commentator has said in the context of parole,

> the institution of the parole system represents a legislative judgment that these men can achieve effective rehabilitation only with the aid of supervision and guidance from governmental officials. Certainly this judgment cannot be considered unreasonable. The recidivism rate of parolees is extremely high. In addition, studies have demonstrated that in certain types of cases, at least, close surveillance by parole officials tends to reduce the rate of recidivism among parolees.

White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167, 183-184 (1969) (footnote omitted). The same analysis applies to the decisions of courts to release convicted defendants on probation. LaFave 138.[7]

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[6] The same holds true for parole. See 18 U.S.C. 4206; *Morrissey* v. *Brewer*, 408 U.S. at 477; *United States* v. *Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985), cert. denied, No. 84-6659 (Oct. 7, 1985); *United States* v. *Thomas*, 729 F.2d at 123.

[7] In a recent Rand Corporation study of recidivism among persons on probation for felony convictions in California, over half of the persons studied were charged with crimes, and almost two-thirds were rearrested, within 40 months of being sentenced. See Petersilia, *Probation and Felony Offenders*, 49 Fed. Probation 4 (June 1985).

The close supervision that is essential to serve the aims of probation may require that probation officers have the authority to conduct searches without a warrant and on reasonable suspicion rather than probable cause. A reduced level of suspicion permits the probation officer to determine more effectively whether rehabilitation is taking place. Moreover, a reasonable suspicion standard permits early intervention in order to prevent destructive conduct by the probationer, who is by definition under correctional treatment for a fairly recent crime.[8] A reasonable suspicion standard also serves the important function of deterrence: it increases the risk to the probationer of engaging in conduct that violates the probation conditions. See *Owens* v. *Kelley*, 681 F.2d at 1367. These functions of a reduced level of suspicion are of particular importance for certain classes of probationers, such as drug offenders and career criminals, who may require especially close supervision in order to prevent the recurrence of hard-to-detect criminal activity.

In the closely analogous administrative search cases, this Court has approved a reduced level of suspicion for similar reasons. The Court has noted that the searches in such cases are not ordinary criminal investigations by "police or uniformed authority" (*Wyman* v. *James*, 400 U.S. at 322-323). Instead, they are designed as part of a regulatory program to enforce compliance with, and to deter violations of, prescribed standards of conduct. A level of suspicion lower than probable cause, or even no individualized suspicion at all, may be necessary for effective regulation, especially when those who are subject to

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[8] This case provides a good illustration of the value of a reduced standard of suspicion. From all that appears, the Wisconsin probation officials, acting on less than probable cause, were able to discover petitioner's possession of a gun before he had an opportunity to use it.

the regulatory program have a history of failing to meet the prescribed standards. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. at 599, 600, 603.

This Court has noted that the standard of probable cause " 'is peculiarly related to criminal investigations' " (*Colorado* v. *Bertine*, slip op. 4 (citation omitted)). A probation officer is not a law enforcement official and is not "engaged in the often competitive enterprise of ferreting out crime" (*Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (footnote omitted)).[9] Instead, as this Court recognized in *Gagnon* v. *Scarpelli*, a probation officer has a " 'double duty to the welfare of his clients and to the safety of the general community, [and] by and large concern for the client dominates his professional attitude' " (411 U.S. at 783-784 (citation omitted)). See also *State* v. *Fields*, 686 P.2d at 1388 (citation omitted) (probation officer is " 'a social therapist in an authoritative setting' "; "a helper, a monitor, and an enforcer"). This dual attitude on the part of probation officers justifies entrusting them with an unusually wide range of discretion. Because of the nature of their responsibilities, probation officers can reasonably be expected to refrain from undue invasions of a probationer's privacy that might hinder rehabilitation.[10] As this Court noted in *Gagnon* v. *Scarpelli*, 411 U.S. at

[9] In the federal system, probation officers, who also serve as parole officers, are not "law enforcement officers" entitled to obtain search warrants. Fed. R. Crim P. 41(a) and (h); 28 C.F.R. 60.2

[10] The justification for warrantless probation searches on reasonable suspicion is not limited to a single probation officer assigned to a particular probationer. Not all probation systems may provide for such individual assignment, and the non-adversarial attitude described in *Gagnon* extends to probation officers generally, especially when one officer is substituting for a fellow officer.

We note, in addition, that a probation search that would be reasonable if conducted by a probation officer should also be deemed reasonable if authorized by a probation officer, even though carried out by or in conjunction with others. Although the way a particular search is conducted may be affected marginally by the probation officer's participation, the most important factor is that the decision to search be made by a probation officer. Moreover, at least in the federal system, probation officers may be sufficiently distant from the residences of probationers that they must, as a practical matter, rely on local law enforcement officers to perform searches that the probation officers deem necessary. See *United States* v. *Consuelo-Gonzalez*, 521 F.2d at 271 (Wright, J., dissenting).

784, "(b)ecause the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion * * *." A probable cause requirement would therefore not only interfere with the goals of the probation system, but it would be unnecessary to guard against the kinds of abuses that a less stringent standard might invite if applied in the law enforcement context.

The reasonable suspicion standard, although not as stringent as the probable cause standard, nonetheless provides an effective check against unjustified invasions of privacy. Thus, this Court concluded in *Delaware* v. *Prouse* that a reasonable suspicion standard satisfied its concern that law enforcement officials not be left with "unbridled discretion" in conducting spot checks of automobiles away from a fixed check-point (440 U.S. at 648). Similarly, the Court concluded in *New Jersey* v. *T.L.O.* that a reasonable suspicion standard was the proper one for preventing "unrestrained intrusions upon the privacy of schoolchildren" and ensuring "that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools" (469 U.S. at 343). In these and other settings, the Court has held that a reasonable suspicion standard provides a sufficient objective standard of reasonableness

against which to measure the exercise of discretion by searching officers where, as in the probation context, the balance of private and governmental interests makes a probable cause standard inappropriate. See *Delaware* v. *Prouse*, 440 U.S. at 654; *Terry* v. *Ohio*, 392 U.S. at 21; compare *Marshall* v. *Barlow's, Inc.*, *supra* (inspection held unreasonable where statute authorized search without any individualized suspicion or other neutral standards). The reasonable suspicion standard thus provides a significant measure of protection to probationers against the risk of arbitrary or harassing searches instituted by probation officers.

The warrant requirement, like the probable cause requirement, is ill-suited to probation searches. Like the probable cause requirement, the requirement of a warrant would interfere with the ability to monitor the probationer's progress and to intervene early in a probationer's misconduct. See *New Jersey* v. *T.L.O.*, 469 U.S. at 340 (warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"). A warrant requirement would also impair the deterrence function of a relaxed search standard. As this Court has said on a number of occasions, where "flexibility as to time, scope, and frequency" of searches is an important part of the regulatory program, a warrant requirement may be inadvisable "if inspection is to be effective and serve as a credible deterrent." *United States* v. *Biswell*, 406 U.S. at 316; see also *Donovan* v. *Dewey*, 452 U.S. at 603. Finally, a warrant requirement may require the involvement of law enforcement officers in every probation search, because, as in the federal system, probation officers may not have the authority to seek a search warrant on their own. See Fed. R. Crim. P. 41(a) and (h); 28 C.F.R. 60.2.

The public interest in permitting probation officers to conduct warrantless searches on reasonable suspicion of a probation violation is strongest when that authority is part of an overall sentencing and corrections scheme. There is no good reason that a sentencing judge, when determining the proper post-conviction treatment of a criminal defendant, should always be put to the choice of imprisoning the defendant or releasing him without the close supervision that a relaxed Fourth Amendment standard makes possible. Precisely because authority to search on reasonable suspicion may be an important tool of supervision, even for defendants who are otherwise thought not to require imprisonment, there is a strong public interest in making this middle course available in the post-conviction treatment of offenders. Indeed, the unavailability of this intermediate status might lead to the imprisonment of many convicted defendants who would otherwise be released. See *United States* v. *Consuelo-Gonzalez*, 521 F.2d at 266; White, *supra*, 31 U. Pitt. L.Rev. at 183-184 ("rules forbidding certain types of surveillance might affect a particular parolee's chances of being released"). Accordingly, authorizing searches on a reduced level of suspicion would serve the interests of many probationers as well as the public generally.

The middle course of relaxed Fourth Amendment protections may be based on individualized determinations by a judge or parole board, as is true in the federal system (18 U.S.C. (Supp. III) 3563, 3651 (probation), 4209 (parole)). It may also be based on a statute or regulation authorizing searches of particular classes of offenders or even all offenders, as Wisconsin has done (Wis. Stat. Ann. § 973.10 (West 1985 & Supp. 1986); Wis. Admin. Code HSS § 328.21; Br. in Opp. 104) and as the United States Parole Commission is authorized to do (18 U.S.C. 4203). In either event, the availability of this special search authority is likely to bear heavily on individual sentencing or parole determinations.

The case for providing officers with the authority to conduct searches on reasonable suspicion and without a warrant is at its strongest, of course, when the sentencing and corrections system affords a judge the power to make individualized judgments about the appropriateness of such authority in a particular case. Case-by-case judgment, however, should not be necessary. Congress may make an across-the-board determination to apply a warrantless inspection program to, for example, the entire mining industry (*Donovan* v. *Dewey, supra*) or to all gun dealers (*United States* v. *Biswell, supra*) without requiring individualized determinations regarding the particular firms that need the closest scrutiny. Because of the diminished privacy interests of probationers and the importance of close supervision, a legislature or adminstrative agency may reasonably determine that authority for warrantless searches on reasonable suspicion is appropriate for probationers as a whole or for particular categories of probationers. In this regard, it is significant that it is only in cases where the particular search at issue was not legislatively or administratively authorized that the federal courts of appeals have held that a probation or parole search must comply with the warrant or probable cause standards. See *United States* v. *Rea*, 678 F.2d at 387 (probation search, not authorized by judge as condition of probation); *United States* v. *Workman*, 585 F.2d at 1208 (apparently, same); *United States* v. *Bradley*, 571 F.2d 787, 788, 789 (4th Cir. 1978) (parole search, not authorized by statute, regulation, or parole release order).

3. ***The search of petitioner's house was authorized by a valid condition of probation***

The search at issue in this case was plainly valid under the standards we have suggested. First of all, the character and purposes of probation in Wisconsin are those of probation generally. Wisconsin treats probationers as being

"in the custody" of the Department of Health and Social Services. Wis. Stat. Ann. § 973.10 (West 1985 & Supp. 1986); Br. in Opp. 101. Probation in Wisconsin aims "to assure public safety, promote social reintegration, [and] reduce repetition of crime." Wis. Admin. Code HSS § 328.01; Br. in Opp. 101. Accordingly, "probation supervision is a mechanism of control and an attempt to guide offenders into socially appropriate ways of living," and probation officers are directed "to help the client be successfully reassimilated into the community, help the client adjust to and cope with community living, reduce crime, and protect the public." Wis. Admin. Code HSS § 328.04(1); Br. in Opp. 101.

Wisconsin's probation regulations expressly provide for searches of a probationer's living quarters or property by probation officers only "if there are reasonable grounds to believe that the quarters or property contain contraband" (Wis. Admin. Code HSS § 328.16(4); Br. in Opp. 103), and they define "contraband" to mean any item whose possession by the probationer is forbidden by law or probation conditions (Wis. Admin. Code HSS § 328.16(1); Br. in Opp. 102). The regulations also provide that a probationer must be notified of all conditions at the outset of probation (Wis. Admin. Code HSS § 328.04(3); Br. in Opp. 102), that a probation officer "strive to preserve the dignity of clients" in conducting searches (Wis. Admin. Code HSS § 328.21(5); Br. in Opp. 103), and that "[w]henever feasible" the probationer be given prior notice of a search (Wis. Admin. Code HSS § 328.21(6); Br. in Opp. 103). The regulations then list 11 factors to be considered in determining whether reasonable grounds exist to suspect a probationer has contraband in a particular case, including the reliability of an informant's information. Wis. Admin. Code HSS § 328.21(7); Br. in Opp. 103-104.

These regulations are obviously closely related to the purposes of probation and are an integral part of the overall sentencing and corrections system in Wisconsin. Further, the notes that accompany and explain the regulations show that careful consideration was given to the need for warrantless searches on reasonable suspicion in order "to deter the possession of contraband" for the benefit of both the public and the probationer. Wis. Admin. Code HSS § 328 Appendix (Note: HSS § 328.21); Br. in Opp. 104-107. The standards provide guidance to probation officers, and they are judicially enforceable, as the opinion of the Supreme Court of Wisconsin demonstrates. See Pet. App. A8-A10. In short, the regulations establish " 'reasonable legislative or administrative standards' " (*Donovan* v. *Dewey*, 452 U.S. at 599 (quoting *Camara* v. *Municipal Court*, 387 U.S. at 538)). By incorporating the reasonable suspicion standard, those standards adequately limit the discretion of probation officers.

The search of petitioner's house at issue in this case was conducted pursuant to those regulations. It was authorized and carried out by probation officers. The search was for contraband—guns that petitioner was prohibited from possessing by law and by the conditions of his probation. Finally, in concluding that there were "reasonable grounds" to suspect that petitioner had a gun, the trial court, the appellate court, and the Supreme Court of Wisconsin were clearly correct. The statement by a detective from the Beloit Police Department that there were or might be guns in petitioner's apartment created an articulable and reasonable basis for suspecting that petitioner in fact had guns. See *New Jersey* v. *T.L.O.*, 469 U.S. at 345-346 (report from teacher gave school principal reasonable grounds for suspecting that student had cigarettes). The search of petitioner's home therefore satisfied the requirements of the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

No. 86-5324

In The
Supreme Court of the United States
October Term, 1986

JOSEPH G. GRIFFIN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

RESPONDENT'S BRIEF

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QUESTION PRESENTED

DOES A WARRANTLESS SEARCH OF A PROBATIONER'S RESIDENCE BY A PROBATION OFFICER ON LESS THAN PROBABLE CAUSE VIOLATE THE STANDARD OF REASONABLENESS EMBODIED IN THE FOURTH AMENDMENT?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

STATUTES

ADMINISTRATIVE RULES

TABLE OF AUTHORITIES—Continued

STATUTES INVOLVED

Sec. 941.29, Wis. Stats. (1981):

Possession of a firearm. (1) A person is subject to the requirements and penalties of this section if he or she has been:

(a) Convicted of a felony in this state.

. . . .

(2) Any person specified in sub. (1) who, subsequent to the conviction for the felony or other crime, as specified in sub. (1), or subsequent to the finding of not guilty or not responsible by reason of insanity or mental disease, defect or illness, possesses a firearm is guilty of a Class E felony.

Sec. 973.09, Wis. Stats. (1985):

Probation. (1)(a) Except as provided in par. (c) or if probation is prohibited for a particular offense by statute, if a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate.

Sec. 973.10, Wis. Stats. (1985):

Control and supervision of probations. (1) Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers and parolees.

ADMINISTRATIVE CODE PROVISIONS INVOLVED

Chapter HSS 328

ADULT FIELD SUPERVISION

HSS 328.01 Purpose. The purposes of this chapter are to provide rules for community and facility-based supervision, services, and programs for clients under control in order to assure public safety, promote social reintegration, reduce repetition of crime and carry out the statutory directives under s. 46.001, Stats.

. . . .

HSS 328.04 Field supervision. (1) Parole and probation supervision is a mechanism of control and an attempt to guide offenders into socially appropriate ways of living. Field staff are to provide individualized supervision of clients in a manner consistent with the goals and objectives of this chapter. Specifically, field staff are to attempt to help the client be successfully reassimilated into the community, help the client adjust to and cope with community living, reduce crime, and protect the public.

(2) An agent shall abide by the department's administrative rules. An agent's responsibilities upon receiving a client for control and supervision shall include:

. . . .

(k) Monitoring the client's compliance with the conditions and rules of supervision to insure appropriate control of the client and the protection of the public;

. . . .

(w) Reporting all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority; and

. . . .

(3) When probation or parole begins, an agent shall meet with a client to review or develop written rules and

specific conditions of the client's supervision, or both. These rules require that the client shall:

. . . .

(j) Obtain advance permission from an agent to purchase, possess, own or carry a firearm or other weapon. An agent may not grant a client permission to possess a firearm if the client is prohibited from possessing a firearm under s. 941.29, Stats., or federal law.

(k) Make himself or herself available for searches or tests ordered by the agent including but not limited to urinalysis, breathalizer, and blood samples or search of residence or any property under his or her control.

. . . .

HSS 328.16 Contraband. (1) In this chapter, "contraband" means:

(a) Any item which the client may not possess under the rules or conditions of the client's supervision; or

(b) Any item whose possession is forbidden by law.

(2) Any field staff member who reasonably believes that an item is contraband may seize the item, whether or not the staff member believes a violation of the client's rules or conditions of supervision has occurred.

. . . .

HSS 328.21 Search and seizure. (1) A search of a client, client's living quarters, or property may be made at any time, but only in accordance with this section.

. . . .

(4) A search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained

unless exigent circumstances require search without approval.

. . . .

(5) Field staff shall strive to preserve the dignity of clients in all searches conducted under this section.

(6) Whenever feasible, before a search is conducted under this section, the client shall be informed that a search is about to occur, the nature of the search, and the place where the search is to occur.

(7) In deciding whether there are reasonable grounds to believe a client possesses contraband, or a client's living quarters or property contain contraband, a staff member should consider:

(a) The observations of a staff member;

(b) Information provided by an informant;

(c) The reliability of the information relied on; in evaluating reliability, attention should be given to whether the information is detailed and consistent and whether it is corroborated;

(d) The reliability of an informant; in evaluating reliability, attention should be given to whether the informant has supplied reliable information in the past, and whether the informant has reason to supply inaccurate information;

(e) The activity of the client that relates to whether the client might possess contraband;

(f) Information provided by the client which is relevant to whether the client possesses contraband;

(g) The experience of a staff member with that client or in a similar circumstance;

(h) Prior seizures of contraband from the client; and

(i) The need to verify compliance with rules of supervision and state and federal law.

APPENDIX [TO HSS 328]

Note: HSS 328.21. This section provides for searches of clients, clients' living quarters and property by field staff. Although it is preferable to have searches and seizure conducted by law enforcement authorities, that may not always be feasible or advisable, and it is deemed important to give field staff the authority to conduct reasonable searches at reasonable times. Experience teaches that these searches may be necessary because contraband, including drugs and weapons, may be discovered during these searches. These searches are thought to deter the possession of contraband.

Contraband, particularly weapons, may be used to threaten, injure, or kill another. That weapons be kept out of the hands of clients is critical for the safety of others. Contraband must also be kept out of the hands of clients so they may be better able to participate in jobs, schooling or training, and other programs effectively.

While the discovery of contraband is important, this is not to say that the authority to search should be without control. Consideration should be given to the possible effects of a search on a client's rehabilitation, or family and peer relationships. Rehabilitation as well as the control of a client is the responsibility of field staff and searches should be conducted so as not to unreasonably upset delicate personal relationships. This section attempts to give due regard to client concerns about their privacy.

STATEMENT OF THE CASE

On April 5, 1983, petitioner Joseph Griffin was on probation for three state misdemeanor convictions: resisting arrest, disorderly conduct, and obstructing an officer. He had previously been convicted of possession of heroin with intent to deliver, a felony. J.A. 6. Griffin had also been convicted of two other felonies and five other misdemeanors.[1]

In Wisconsin, probationers are in the legal custody of the State Department of Health and Social Services. Sec. 973.10, Wis. Stats. (1985). Imposition of probation subjects an individual to the department's control under conditions set by the court and rules and regulations established by the department for supervising both probationers and parolees. *Id.* These rules are codified at Chapter HSS 328 of the Wisconsin Administrative Code (1982), entitled "Adult Field Supervision." The rules provide, *inter alia*, that when probation begins, the agent reviews the conditions of probation with the probationer. Sec. HSS 328.04(3). One condition is that a probationer obtain advance permission from an agent to possess a firearm (although the agent may not permit a convicted felon to possess such a weapon). Sec. HSS 328.04(3)(j). Another condition is that the probationer must make himself or herself available for searches, including searches of the residence, as ordered by the agent. Sec. HSS 328.04(3)(k).

---

1. Before Griffin testified at trial, the parties had to agree on the number of prior convictions because the prosecutor intended to impeach him with those convictions. After a review of Griffin's criminal record, the parties agreed that he had eleven prior convictions: three felonies and eight misdemeanors. R.40:146-55.

A separate rule, sec. HSS 328.21, governs the searches by agents, and permits searches on approval of the agent's supervisor upon reasonable grounds to believe that there is contraband at the residence. Contraband means any item that the probationer cannot possess under the conditions of supervision or by law and includes a firearm possessed by a felon. See. HSS 328.16.

On April 5, 1983, Michael Lew, a supervisor for the State Bureau of Probation and Parole in Beloit, Wisconsin, received a phone call from the Beloit Detective Bureau that Griffin "may have had guns in his apartment." J.A. 14. After waiting two or three hours for Griffin's probation officer, Lew made arrangements with another probation agent, Ms. Joanne Johnson, and three Beloit police officers to go with him to Griffin's apartment to search for guns. J.A. 15-16. Lew did not carry a weapon and requested the presence of the police officers for protection. J.A. 15.

Mr. Lew, Ms. Johnson, and the police officers went to Griffin's apartment. When Griffin answered the door, Lew informed him who they were and that they were going to search his residence. The police officers did not participate in the search. J.A. 15-16.

Ms. Tanya Turner, who lived with Griffin, was also at the apartment when Lew and the others arrived for the search. She left the apartment after about fifteen minutes. J.A. 17, 32.

When Mr. Lew entered the living room, followed by Ms. Johnson, one of the officers pointed toward a table with a partially-open drawer. J.A. 20, 23-24. Mr. Lew was heading toward the drawer, looked inside it, and found

a gun, a .357 Magnum. J.A. 15. Ms. Johnson found bullets for the gun. J.A. 59. Mr. Lew then directed the officers to take Griffin into custody on a probation violation apprehension. J.A. 23.

Contrary to petitioner's assertions, the search of his apartment was not for the explicit purpose of seizing evidence of a crime to be used in a subsequent criminal proceeding. The search was for the purpose of verifying a report that Griffin had violated a condition of his probation that also happened to be a criminal act.

On April 11, 1983, the district attorney charged Griffin with possession of a firearm by a convicted felon, contrary to sec. 941.29(2), Wis. Stats. (1981), which is itself a felony. J.A. 6-8.

Griffin moved to suppress the evidence seized as a result of the search, arguing that because there was neither a warrant nor probable cause, the search violated his Fourth Amendment rights. The trial court denied the motion, J.A. 42-47, ruling that as a probationer, the probation authorities could lawfully search his apartment on less than probable cause and without a warrant. He was subsequently convicted of possession of a firearm by a convicted felon. His conviction was affirmed by the Wisconsin Court of Appeals, *State v. Griffin*, 126 Wis. 2d 183, 376 N.W.2d 62 (Ct. App. 1985), and by the Wisconsin Supreme Court, *State v. Griffin*, 131 Wis. 2d 41, 388 N.W.2d 535 (1986).

SUMMARY OF ARGUMENT

The underlying command of the Fourth Amendment is that searches and seizures must be reasonable. In most situations, both a warrant and probable cause are needed to justify a search, especially when an entry is made into the home. But this Court has not hesitated to alter those requirements when a careful balancing of governmental and private interests shows that the public interest is best served by requiring neither.

In deciding whether to depart from the requirements of a warrant or probable cause, the Court looks to the category or context of the search. In the area of administrative searches, a warrant is usually required, but where the degree of regulation is necessarily pervasive, the Court has found the warrant requirement ill-suited to the public interest. The Court has also examined the context of the prison cell and concluded that there is no expectation of privacy at all; hence, the Fourth Amendment does not even apply there. In the school context, the Fourth Amendment applies but the nature of the school setting justifies a modification in both the warrant requirement and the level of suspicion needed to justify a search.

Probation is also a context that justifies a change in both the warrant requirement and the requisite level of suspicion. Probation may be regarded as an area of pervasive, even intense, regulation. Although probationers are not totally without Fourth Amendment protections, their expectations of privacy are necessarily less than those of the average citizen. They are subject to restrictions on their liberty which other citizens need not endure. So long as these restrictions are reasonably related to the purposes of probation, they are lawful.

Probation has a dual nature, rehabilitation of the offender and protection of the public. A warrantless search of a probationer's residence by a probation officer who suspects the presence of contraband (here, illegal firearms) serves both interests.

Nearly 1.9 million adults are on probation in this country. Many of them, like the petitioner, are convicted felons and, as such, pose a substantial threat to public safety. In many cases, courts have little choice in the matter: prison overcrowding and the economics of modern-day corrections are facts of life that require sentencing judges to think twice before ordering incarceration. For the most part, this staggering number reflects a judgment that many persons convicted of crime do not pose an unreasonable risk to society, so long as they abide by the conditions of their probation.

A condition of probation that permits a warrantless search of the probationer's residence may be necessary to ensure public safety. In the absence of such restrictions on probationers' privacy interests, sentencing judges will be less inclined to grant probation in marginal cases. These searches also serve a rehabilitative function, because they deter probationers from keeping contraband, such as illegal weapons or drugs.

Petitioner's concerns for the rights of innocent third parties are also felt by the Wisconsin probation authorities who, in their rules covering probation searches, direct field staff to consider these concerns. But the rights of third parties may be implicated in any Fourth Amendment context and should not prevent the probation officer from doing his or her job.

Petitioner is also concerned about police abuse. But so long as the search is initiated by the probation authority, as it was here, there is little danger of abuse. Cooperation by the police, as may be necessary (especially where the probation officer requests police protection), does not turn a probation search into a police search. The abuse that took place here was that Mr. Griffin, who, by possessing an illegal firearm, violated one of the most important conditions of his probation.

The rules governing probation searches offer adequate protection against the abuses that petitioner imagines. They strike a reasonable balance between the legitimate concerns of the probationer and the rights of the public.

ARGUMENT

A WARRANTLESS SEARCH OF A PROBATIONER'S RESIDENCE ON REASONABLE SUSPICION THAT THE PROBATIONER HAS ILLEGAL WEAPONS DOES NOT VIOLATE THE FOURTH AMENDMENT WHEN THE SEARCH IS CONDUCTED BY A PROBATION OFFICER, WHERE AGREEMENT TO SUCH A SEARCH IS A CONDITION OF PROBATION, AND WHERE THE SEARCH IS OTHERWISE REASONABLE.

I. BACKGROUND: THE HISTORY AND THEORY OF PROBATION

In *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972), which established minimum due process standards for parole revocation proceedings, the Court began its analysis by "recall[ing] the function of parole in the correctional

process." It is no less important here, where the Fourth Amendment interests of probationers are at issue, to recall the function of probation in the correctional process.

Probation and parole serve similar purposes but are not identical. The essence of parole is release from prison, before the completion of sentence, on the condition that the parolee abide by certain conditions during the term of his parole supervision. *Morrissey v. Brewer*, 408 U.S. at 477. Probation is an alternative to prison; it is "discipline under supervision without incarceration." *Phillips v. United States*, 212 F.2d 327, 334 (8th Cir. 1954).

Generally there are three ways in which probation occurs: (1) The judge imposes a term of incarceration and then suspends the sentence on the condition that the offender successfully complete a term of probation under the supervision of a probation officer. (2) The judge withholds imposition of sentence on the condition that the offender successfully complete the term of probation; failure to successfully complete probation results in imposition of a final sentence. (3) The judge sentences the offender directly to a term of probation; a violation may result in resentencing. All variants may also involve a brief period of incarceration as a condition of probation.[2] Other conditions may require restitution to the victim, community service work, professional counseling, limiting access to certain people or places, and a host of restrictions not shared by the general public.[3] The common

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2. Bureau of Justice Statistics, Department of Justice, Bulletin, Probation and Parole 1984, NCJ-100181 (February 1986) at 2. The third variant, a direct sentence of probation, is not available in Wisconsin. Sec. 973.09(1), Wis. Stats. (1985).

3. *See generally* Neil P. Cohen and James J. Gobert, *The Law of Probation and Parole* § 5 (1983).

ground of probation and parole is supervision by community-corrections officers of those who have been convicted of crimes.

Probation is largely a twentieth century phenomenon in the American corrections system, although its origins go back to the labors of a nineteenth century Boston shoemaker, John Augustus.[4] In 1841, Augustus began his volunteer work of bailing out and counseling convicted offenders. Other volunteers joined Augustus and in 1878, Massachusetts enacted the first state probation law.

By 1900, six states had passed legislation authorizing probation. But not until 1967 did every state have in place a statutory scheme of probation for adult offenders. Congress enacted federal probation legislation in 1925.[5]

Probation is now the most common disposition in the criminal justice system. At year-end 1985, a record 1,870,132 adults were on probation in this country.[6] Another 277,438 were on parole, bringing the total community corrections population to more than 2.1 million adults. The prison population was just over one-half million (503,315) with another 254,094 housed in various jails.[7]

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4. *See generally* American Probation and Parole Association, *A Report of the Labors of John Augustus* (Bicentennial ed. 1984); Cohen and Gobert, § 1.02.

5. Law of March 4, 1925, ch. 521, 43 Stat. 1259 (current version at 18 U.S.C. § 3651 *et seq.*). This Court had held that in the absence of such legislation, the federal courts were powerless to suspend a sentence and grant probation. *Ex parte United States*, 242 U.S. 27 (1916).

6. Bureau of Justice Statistics, Department of Justice, Bulletin, Probation and Parole 1985, NCJ-103683 (January 1987).

7. *Id.*

Wisconsin first authorized probation in 1909.[8] Probation was then available only to first-time offenders and could not be used if the maximum penalty for the offense exceeded ten years.[9] Today probation is available to all convicted offenders in Wisconsin except for the crime of first-degree murder or where a statute specifically precludes probation. Sec. 973.09(1), Wis. Stats. (1985). At the end of 1985, 24,288 adults were under probation supervision in Wisconsin.[10]

Virtually every authority that has considered the issue views rehabilitation of the offender as a major goal of both probation and parole.[11] In *Gagnon v. Scarpelli*, 411 U.S. 778, 783 (1973), which applied the due process standards of *Morrissey v. Brewer* to probation revocation proceedings, this Court emphasized that specific purpose.[12] But protection of the public is an equally important goal of probation,[13] especially in Wisconsin, where the Wisconsin Supreme Court, in its decision below, emphasized what it had for years considered to be probation's "dual role" of rehabilitation of the probationer and protection

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8. Ch. 541, Wis. Laws of 1909, which became secs. 4734a to 47341, Wis. Stats. (1911).

9. Secs. 4734a and 4734b, Wis. Stats. (1911).

10. Bulletin NCJ-103683, at 2.

11. Cohen and Gobert, at 182.

12. This Court lumped together probation and parole, even referring to the "probation/parole system." 411 U.S. at 785. Probation and parole have indeed been called the "bookends" of the correctional process. Preface to *A Report of the Labors of John Augustus*, at xi. The term "community corrections" is often used to include both.

13. Cohen and Gobert, at 183-84.

of the public. *State v. Griffin*, 131 Wis. 2d at 54-56, 388 N.W.2d at 539-40.

The rules and conditions governing probation (as well as parole) are regulatory in nature. They will vary from state to state as each jurisdiction exercises its judgment as to when and under what terms and conditions probation should be granted, and how public safety is best served in administering a comprehensive program of community-based corrections.

This Court has noted an abiding respect for the States' efforts in guarding the public safety against crime:

> The "legitimate and compelling state interest" in protecting the community from crime cannot be doubted. *De Veau v. Braisted*, 363 U.S. 144, 155 (1960). . . . We have stressed before that crime prevention is "a weighty social objective," *Brown v. Texas*, 443 U.S. 47, 52 (1979), and this interest persists undiluted in the juvenile context.

Schall v. Martin, 467 U.S. 253, 264 (1984). That interest must be no less diluted in the probation context.

Any analysis of a probation-related problem that fails to recognize the dual nature of probation, of rehabilitation *and* protection of the public, will be flawed from its inception. So, too, should this Court respect the alternative approaches that the States may choose in dealing with community corrections.

Over the last two decades, probation has taken on a decidedly different character because so many probationers, like petitioner Griffin, are convicted felons. Unlike the practice in the time of John Augustus or when Wisconsin first adopted probation, courts now regularly

extend probation in felony cases (or in misdemeanor cases where the defendant has a prior felony record). Sometimes that disposition is undoubtedly in the best interests of the offender and the public. But often the prisons are so overcrowded (and many state prison officials are under court orders because of the overcrowded conditions) that incarceration, except for the most dangerous offenders, is no longer a realistic alternative. A recent Rand Corporation study concluded that this trend, granting felons probation, "presents a serious threat to public safety."[14]

Although probation is generally successful,[15] its failures often translate into a swelling of the prison population. In 1985, 2,835 adults were admitted into the Wisconsin prison system. More than a fourth, 29.8%, went to prison because of a probation violation, either because of revocation or a new sentence. Another 29.7% of the total admissions were readmissions, people who violated some kind of parole supervision. This means that *half* of the total admissions to Wisconsin's prisons had just come from probation or parole.[16]

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14. Joan Petersilia, Susan Turner, James Kahan, and Joyce Peterson, *Granting Felons Probation: Public Risks and Alternatives*, at vi (1985); Joan Petersilia, "Probation and Felony Offenders," *Federal Probation*, at 4-9 (June 1985).

15. Eighty percent of probationers in Wisconsin and nationwide successfully complete their terms of supervision. Wisconsin Division of Corrections, Bureau of Community Corrections, Annual Report, at 4 (December 1986); Bulletin NCJ-100181, at 3 (copies lodged with the Court).

16. Report of Wisconsin Corrections Population, Statistical Bulletin C-59 (October 1986) (copies lodged with the Court).

This Court has written: "The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Bearden v. Georgia*, 461 U.S. 660, 670 (1983). That statement must be qualified: only with conditions to ensure public safety may a sentencing court confidently make that determination.

We are committed to probation as an integral part of the corrections process. Economics plays a major role in that commitment: community supervision costs about $3.00 per day per offender, incarceration about $50.00 per day per inmate.[17]

Probation has changed since the days of John Augustus and is still changing. Various states, including Wisconsin, are developing intensive surveillance programs to respond to the changing character of the offenders who must now be supervised. To meet the challenge of using scarce resources to supervise so many potentially dangerous people, the States are considering electronic surveillance, house arrest, and other more pervasive forms of supervision.[18] These all have Fourth Amendment implications that this Court's decision will affect.

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17. Wisconsin Division of Corrections, Annual Report, at 3.

18. Rand Study at 64-77; Wisconsin Annual Report at 14-15. Wisconsin has also developed a "High Risk Offender" project which will combine many of the components of the intensive surveillance project. *Id. See generally* the June 1986 issue of *Federal Probation*, devoted entirely to intensive probation supervision topics.

II. THE UNIQUE NATURE OF PROBATION SUPERVISION JUSTIFIES A WARRANTLESS SEARCH OF A PROBATIONER'S RESIDENCE BY A PROBATION OFFICER ON LESS THAN PROBABLE CAUSE.

A. The context of a search determines both the need for a warrant and the applicable level of suspicion required to justify the search.

The underlying command of the Fourth Amendment is that searches and seizures must be reasonable. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983) ("overarching principle" is one of "reasonableness"). Because the test of reasonableness "is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), the category or context of a given search will determine what is or is not reasonable. Although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, and are both frequently needed, in certain circumstances neither is required. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring).

Focusing on context, the Court has developed special rules for border searches, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), civil or administrative searches, *Camara v. Municipal Court*, 387 U.S. 523 (1967), searches conducted in furtherance of "community caretaking" functions, *Cady v. Dombrowski*, 413 U.S. 433 (1973), searches of prison cells, *Hudson v. Palmer*, 468 U.S. 517 (1984), and searches of students, *New Jersey v. T.L.O.*

The Court's treatment of administrative searches is especially pertinent to the search of Griffin's residence, since these searches are generally conducted to maintain

discipline or to enforce rules and regulations. Although the Court required a warrant in *Camara*, it significantly changed the standard for what constitutes probable cause in order to adjust the protections of the Fourth Amendment to the unique aspects of the context. 387 U.S. at 534-39.

Subsequent administrative search cases have brought additional developments. Entry with neither a warrant nor any particularized suspicion is permitted pursuant to a legislative scheme for pervasively regulated industries. *See Donovan v. Dewey*, 452 U.S. 594 (1981) (inspection of mines); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcohol dealers). Therefore, depending on the pervasiveness of the regulation, the requirements of a warrant and probable cause may not serve the public interest and will not be demanded.

Context determines whether the Fourth Amendment applies at all to a particular category of searches and then, if it does apply, to what extent a warrant or probable cause will be necessary. In *Hudson v. Palmer*, 468 U.S. at 536, the Court held that "the Fourth Amendment has no applicability to a prison cell." The context of the prison setting ordained that holding. The Court reviewed statistics illustrating the magnitude of the problem inherent in prison administration, 468 U.S. at 526, and emphasized the particular dangers of weapons and drugs in the hands of prisoners. 468 U.S. at 527. It concluded: "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." 468 U.S. at 527-28 (footnote omitted).

In examining the context of the prison cell, the Court considered many factors: the government's compelling interests in security, the ad hoc judgments required of prison officials, the need for close supervision, the proven antisocial behavior of the prisoners, the dangers of contraband, and the record of prison violence. The combination of these factors rendered traditional Fourth Amendment protections in direct conflict with the principles of sound prison administration. From the point of view of pervasiveness of regulation, there is no institution that regulates more pervasively or more intensively than a prison.

In *New Jersey v. T.L.O.*, the Court held that schoolchildren do retain some Fourth Amendment rights. Although disorder and violence has been a major problem in the schools, as evidenced by studies cited by the Court, 469 U.S. at 339, the situation is not so dire that students may claim no legitimate expectation of privacy. 469 U.S. at 338. Yet, the specific context of the school setting compels a modification of both the warrant requirement and the probable cause standard. 469 U.S. at 340.

The substantial interest of teachers and administrators in maintaining discipline and the need for close and flexible supervision were not completely incompatible with the existence of Fourth Amendment protections but still required a change in the traditional warrant requirement and probable cause standard of suspicion. What the Court did, as it has done on prior occasions, was to strike a "balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." 469 U.S. at 340. *See also Camara v. Municipal Court*, 387 U.S. at 532-33.

Numerous courts have previously considered the issue now before this Court. Petitioner has cited several lower court decisions that have resolved the issue in his favor. These opinions reflect what is probably the minority view. The majority position is represented by the following cases, considering searches of both probationers and parolees, many involving residential searches: *United States v. Scott*, 678 F.2d 32, 34-35 (5th Cir. 1982); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975); *United States v. Thomas*, 729 F.2d 120 (2d Cir. 1984); *United States ex rel. Santos v. New York State Board of Parole*, 441 F.2d 1216 (2d Cir. 1971); *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982); *People v. Anderson*, 189 Colo. 34, 536 P.2d 302, 305 (1975); *State v. Fields*, 686 P.2d 1379, 1389-90 (Hawaii 1984); *State v. Turner*, 142 Ariz. 138, 688 P.2d 1030 (Ct. App. 1984); *State v. Pinson*, 104 Idaho 227, 657 P.2d 1095, 1099-1100 (Ct. App. 1983); *People v. Huntley*, 43 N.Y.2d 175, 401 N.Y.S.2d 31, 371 N.E.2d 794, 796 (1977); *State v. Earnest*, 293 N.W.2d 365, 368-69 (Minn. 1980); *State v. Velasquez*, 672 P.2d 1254 (Utah 1983); *State v. Gallagher*, 100 N.M. 697, 675 P.2d 429 (Ct. App. 1984); *State v. Perbix*, 331 N.W.2d 14 (N.D. 1983); *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980); *Seim v. State*, 95 Nev. 89, 590 P.2d 1152 (1979); *State v. Bellinger*, 169 N.J. Super. 553, 405 A.2d 432 (1979); *State v. Cummings*, 262 N.W.2d 56 (S.D. 1978); *Tamez v. State*, 534 S.W.2d 686 (Tex. Cr. App. 1976); *Sanderson v. State*, 649 P.2d 677 (Wyo. 1982); *People v. Richards*, 76 Mich. App. 695, 256 N.W.2d 793 (1977); *State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329 (1977); *Lake v. State*, 178 Ga. App. 614, 344 S.E.2d 452 (1986); *State v. Gardner*, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980); *State v. Malone*, 403 So. 2d 1234 (La. 1981); *State v. Simms*, 10

Wash. App. 75, 516 P.2d 1088 (1973); *State v. Mitchell*, 22 N.C. App. 363, 207 S.E.2d 263 (1974).

The Court must now look to the context of community corrections, probation in particular,[19] to determine whether some alteration in either the warrant requirement or probable cause level of suspicion, or both, is appropriate.[20]

B. The context of probation, like that of the school setting, requires a modification of both the warrant requirement and the probable cause level of suspicion needed to justify a search of a probationer's residence by a probation officer.

1. A probationer has a reduced expectation of privacy that justifies an easing of the restrictions to which searches by the probation authority would otherwise be subject.

The Fourth Amendment protects one's expectation of privacy, so long as that expectation is one that society is prepared to recognize as legitimate. *New Jersey v. T.L.O.*,

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19. Most courts and commentators agree that for purposes of the Fourth Amendment, there is no significant difference between probation and parole. *State* v. *Earnest*, 293 N.W.2d at 368 n.2; *State* v. *Pinson*, 657 P.2d at 1099; *Roman* v. *State*, 570 P.2d 1235, 1237 n.3 (Alaska 1977); *State* v. *Velasquez*, 672 P.2d at 1258; *State* v. *Simms*, 516 P.2d at 1090 n.1; 4 W. LaFave, *Search and Seizure* § 10.10(c), at 138 n.49 (2d ed. 1987); *Contra People* v. *Burgener*, 41 Cal. 3d 505, 224 Cal. Rptr. 112, 714 P.2d 1251, 1268-69 (1986).

20. This Court has previously held that "'[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . . .'" *United States* v. *Ramsey*, 431 U.S. 606, 619 n.14 (1977). Because probation was not even in existence when the constitution was adopted, history will shed little light on the intent of the drafters on this issue.

469 U.S. at 338. A necessary corollary of this principle is that the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." *Id.*

To say that an individual has an expectation of privacy is only to begin the analysis. Depending on context, one's privacy expectation may be less than that held by other citizens. For example, although students have some privacy interests that society is prepared to recognize as legitimate, they have "a lesser expectation of privacy than members of the population generally." *New Jersey v. T.L.O.*, 469 U.S. at 348 (Powell, J., concurring).

Probationers are not without any Fourth Amendment rights. In *Hudson v. Palmer*, the Court noted its insistence that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. 468 U.S. at 523. So, too, must probationers be accorded those rights not fundamentally inconsistent with their supervision or incompatible with the objectives of probation itself. There is no need to strip the probationer of all Fourth Amendment protections so long as supervision can be effective. And while the regulation of probationers must be pervasive, it need not be as totally pervasive as that of the prison environment. Therefore, probationers have some expectation of privacy that society must recognize as legitimate, so long as it is consistent with their probationary status.

Although probationers retain some expectation of privacy, their Fourth Amendment rights are not equal to those held by the general public. Even petitioner seems to concede that point, for several of the lower court decisions on

which he relies accept that proposition. Most courts that have considered the point have so held.[21]

The reasons for this lesser expectation of privacy lie in the nature of probation. First, probationers are subject to conditions, like those imposed on parolees, that "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer,* 408 U.S. at 478 (listing several typical conditions of parole; *see also Minnesota v. Murphy,* 465 U.S. 420, 422 (1984)).

Another difference is that the probationer, unlike the ordinary citizen, is in the legal custody of the state. Sec. 973.10, Wis. Stats. (1985). Although the fact of legal or constructive custody cannot justify a revocation of probation or parole without some effective but informal procedural guarantees, *Morrissey v. Brewer,* 408 U.S. at 483, the fact of legal custody still remains. It may not warrant a total relinquishment of Fourth Amendment rights but it justifies, even compels, some diminution of those rights. How much of a diminution is in order? Only so much as is necessary to effectuate the legitimate goals of probation, rehabilitation and protection of the public. Because probation necessarily entails supervision (a third critical difference between the probationer and the ordinary citizen), a probationer cannot claim a full and undiminished expectation of privacy.

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21. "Although there is some authority to the effect that the Fourth Amendment rights of probationers and parolees are of precisely the same scope and dimension as those of the public at large, the weight of authority is to the contrary." 4 W. LaFave, *Search and Seizure* § 10.10, at 127-28 (footnote omitted).

In *New Jersey v. T.L.O.,* 469 U.S. at 338-39, this Court noted that " '[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration,' " citing *Ingraham v. Wright,* 430 U.S. 651, 669 (1977), and refused to equate the two for purposes of the Fourth Amendment. The differences between probationers and prisoners are not so striking: while they are separated by the reality of incarceration, they *share* the harsh fact of criminal conviction. That is a fourth difference between the probationer and the ordinary citizen.

The cases of *New Jersey v. T.L.O.* and *Hudson v. Palmer* provide a useful framework for considering the Fourth Amendment rights of probationers. Together with the context of the nonconvicted nonincarcerated adult at home, they form a spectrum:

Prisoner in a cell	Student in school	Nonconvicted adult at home
4th Amendment not applicable:	4th Amendment applies:	4th Amendment applies:
	Needed to justify a search:	
No warrant No suspicion	No warrant Reasonable suspicion	Warrant Probable cause

Where on this spectrum does the search of the probationer fall? Why should society require either a warrant or probable cause for the search of the convicted probationer when it requires neither for the search of the presumptively innocent schoolchild? Common sense dictates that this Court place the search of the probationer somewhere between the search of the prisoner in the cell and that of the schoolchild. Who poses the greater threat to society?

Who is in greater need of rehabilitation? Can one seriously contend that the probationer should have *more* Fourth Amendment protections than the schoolchild?

In striking the proper balance between the interests of the probationer and the interests of the probation authority, the Court should recall the twin goals of probation, rehabilitation of the offender and protection of the public. These factors are similar to those that prompted this Court to modify the usual warrant and probable cause requirements of a search in *New Jersey v. T.L.O.* and apply with equal, if not greater, force to probationers.

The "government's need for effective methods to deal with breaches of public order," *New Jersey v. T.L.O.*, 469 U.S. at 337, is a factor in determining the standards of reasonableness of a search. In the context of probation, this need can be summarized in one word: risk. Probation is the supervision of a group of people who, by their own recent criminal conduct, have shown that they pose a serious and substantial risk to the public. And, of course, the risk is even greater when felons are granted probation. The Wisconsin Supreme Court cogently recognized this risk and the only way to minimize it:

> The theory of probation contemplates that a person convicted of a crime who is responsive to supervision and guidance may be rehabilitated without placing him in prison. This involves a prediction by the sentencing court society will not be endangered by the convicted person not being incarcerated. This is a risk that the legislature has empowered the courts to take in the exercise of their discretion. To be effective, there must be adequate supervision to guide the probationer into useful and productive activities and away from further criminal activity and to insure that society's interest in its own safety is not jeopardized.

> If the convicted criminal is thus to escape the more severe punishment of imprisonment for his wrongdoing, society and the potential victims of his anti-social tendencies must be protected. Supervision must be such as to most likely assure such result. The probation officer cannot maintain a personal surveillance over each probationer placed under his charge. He must depend on reports from others, oftentimes anonymous, which the officer must check out.

State v. Evans, 77 Wis. 2d 225, 231, 252 N.W.2d 664, 666-67 (1977).

Conditioning probation on the ability to search bears a reasonable relationship to the purposes of probation. Petitioner and his supporting *amicus* argue that Griffin had no real choice in the matter, claiming that the choice between probation and incarceration was so coercive as to be no choice at all. In one sense, it makes no difference if the probationer consents to the search condition, just as it was hardly necessary to the Court's holding in *New Jersey v. T.L.O.* to find that T.L.O. consented to the search of her purse. Furthermore, the Wisconsin Supreme Court did not rely on consent in upholding the search condition. *State v. Griffin*, 131 Wis. 2d at 58 n.6, 388 N.W.2d at 541 n.6. However, the concept of choice, from the view of the probationer and from the view of the sentencing judge, merits further examination.

Although any choice that Griffin faced may have been hard, it was no harder than that faced by Barbara James, who had to decide between refusing a welfare home visit and the cessation of aid. *Wyman v. James*, 400 U.S. 309, 324 (1971). Although the choice was hard, Griffin was not without other options. If the search condition

was so onerous or unreasonable, he could have petitioned the sentencing court for modification of the condition.[22] Furthermore, "[i]f the defendant finds the conditions of probation more onerous than the sentence which would have been imposed he can refuse the probation." *Garski v. State*, 75 Wis. 2d 62, 77, 248 N.W.2d 425, 433 (1977).

As difficult as the choice may be for a probationer,[23] it may be even more difficult for the sentencing judge. In many cases, especially those involving felons or criminal defendants with lengthy records, probation carries a substantial risk to the public, or, as the Idaho Court of Appeals characterized it, "a threat to society because of the possibility that the probationer will relapse into criminal behavior." *State v. Pinson*, 657 P.2d at 1099. Yet, that risk can be reduced to an acceptable level if the court is confident in the ability of the probation authority to closely supervise. The routine home visit, which petitioner concedes is lawful, may not be adequate to protect the public. Only a condition of probation that permits a search of the probationer's residence may satisfy the sentencing judge that probation is an acceptable risk. The

22. Section 973.09(3)(a), Wis. Stats. (1985), provides: "Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof." *See also State v. Sepulveda*, 119 Wis. 2d 546, 350 N.W.2d 96, *reconsideration denied*, 120 Wis. 2d 231, 353 N.W.2d 790 (1984) (discussing trial court's power to modify conditions of probation).

23. Although attempts to justify a search condition on grounds of consent or waiver have been questioned, even critics recognize that notice to the probationer that a search is a condition of probation serves a proper rehabilitative function. 4 LaFave, § 10.10(c), at 141.

Minnesota Supreme Court recognized this choice from the trial court's point of view:

> To these considerations, it might be added that putting onerous restrictions on the ability of a probation officer to protect the public interest may actually deter courts from a judicious use of probation in the future in marginal cases. A court's uncertainty as to the ability of a probation officer to supervise his probationers closely may tip the balance when it comes to sentencing.

State v. Earnest, 293 N.W.2d at 369. The North Dakota Supreme Court echoed the same concern in upholding a warrantless search condition of probation:

> If probation conditions related to the purposes of probation cannot be imposed by a trial judge, the use of probation may substantially decline. Thus, in those cases in which a judge is wavering between an active or a suspended sentence, such restrictions might well tip the scales in favor of imprisonment because the judge cannot impose the type of sentence he or she believes appropriate under the circumstances.

State v. Perbix, 331 N.W.2d at 21.

2. As a practical matter, the warrant requirement is ill-suited to probation supervision.

Community corrections, by its very nature, involves pervasive regulation, perhaps not as pervasive as the prison setting, but significantly more pervasive than other areas of regulation that have been held to not require a warrant, such as regulation of gun dealers, alcohol dealers, and mines. Probation is the regulation of people who have demonstrated an inability to conform their con-

duct to the requirements of the law. They pose substantial risks.

Returning to the school search case, "close supervision" of schoolchildren is necessary to foster a proper educational environment. *New Jersey v. T.L.O.*, 469 U.S. at 339. It is even more necessary in the probation context. Supervision is the essence of probation. It is obvious how it serves the interest of protecting the public. But it also serves the function of rehabilitation as well:

> Experience teaches that these searches may be necessary because contraband, including drugs and weapons, may be discovered during these searches. These searches are thought to deter the possession of contraband.
>
> Contraband, particularly weapons, may be used to threaten, injure, or kill another. That weapons be kept out of the hands of clients is critical for the safety of others. Contraband must also be kept out of the hands of clients so they may be better able to participate in jobs, schooling or training, and other programs effectively.

Appendix Note to Section HSS 328.21, Wisconsin Administrative Code (1982).

This court has previously recognized the deterrence factor in assessing the need for a warrant in other administrative search contexts: "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection . . . ." *United States v. Biswell*, 406 U.S. at 316.

Not only is close supervision itself necessary to the efficient administration of any system of probation, flexibility in providing that supervision is also essential, just as it is in the school setting. *New Jersey v. T.L.O.*, 469 U.S. at 339-40. And just as "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools," 469 U.S. at 340, so, too, would requiring the probation officer to first obtain a warrant interfere with the task of effective supervision of the probationer.

The warrant requirement would unduly impair the proper function of probation supervision. The breadth of authority and discretion of the community corrections officer, *Morrissey v. Brewer*, 408 U.S. at 479, is not unlike that of the teacher. This Court has not hesitated to dispense with the warrant requirement upon a showing that the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *New Jersey v. T.L.O.*, 469 U.S. at 340. When a probation officer receives a report that a probationer has contraband, especially a firearm, does not society demand that the agent check out the matter? Not by merely questioning the sources of the report, but by seeing for himself if it is true.

We would not say that Mr. Choplick, the Assistant Vice Principal in *New Jersey v. T.L.O.*, was doing his job if instead of searching T.L.O.'s purse he had tried to get a warrant? Wasn't Mr. Low just doing his job, doing what society expects of our probation officers, by checking out, in the most effective manner he knew, the report that Griffin may have had guns?

Respondent is not insensitive to the fact that the search in question was a search of the home. That is why the exception to the warrant requirement that the Court is asked to recognize must be narrowly drawn. But the conditions of probation apply equally when the probationer is at home as when he is not. The home is where the probationer is likely to hide weapons, drugs, and other contraband. It is not likely that the probationer will admit to the probation officer that he has these items. The home visit will not ferret out and detect these abuses.

Petitioner invokes the name and writings of William Pitt to support his cause (pet. br. at 12). Indeed, the poorest man in his cottage may generally bar the King and all his forces from his home. But did William Pitt even know of probation? Even then, petitioner concedes that if the King's probation officer were coming for a home visit, then this cottage dweller, no matter what his station in life, could not deny entrance.

That the search was a search of the home does not mean that the warrantless entry was *per se* unlawful. The ultimate test is still that of reasonableness. Because the case of a probationer is *sui generis*, because the probationer's expectation of privacy is less than that of the ordinary citizen, it will not suffice to view the problem in the simple terms which petitioner posits.

Petitioner concedes that the Fourth Amendment does not disable a probation officer from entering the home without a warrant if the purpose is to conduct a "routine" supervisory visit. He acknowledges *Wyman v. James* but suggests from its holding that a supervisory visit of a probationer may not even be a Fourth Amendment search at all. This crabbed reading of *Wyman v. James* does not withstand scrutiny.

The home visit in *Wyman* was upheld not because the Fourth Amendment was not implicated by it but because "it does not descend to the level of unreasonableness." 400 U.S. at 318. It may not have been a technical "search" but it was a governmental intrusion that directly implicated the Fourth Amendment. "Any interference with interests protected by the Fourth Amendment is, of course, intrusive to some degree." *United States v. Villamonte-Marquez*, 462 U.S. at 592.

Petitioner writes that he could not complain if in the course of a routine supervisory visit the probation officer spotted evidence, in plain view, of a crime and that evidence was used against him in a subsequent criminal proceeding. Why could he not complain? What was the prior justification for the probation officer being in position to make the plain view observation? *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971) (plain view doctrine). Is it consent? After all, the supervisory visit is a condition of probation. Petitioner would not concede that justification, because, he argues, he had no real choice in the matter.

Griffin argues that the supervisory visit is permitted for three reasons: (1) it was minimally intrusive; (2) it was directly related to the probation agent's supervisory function; and (3) it was not for the purpose of uncovering evidence of a crime. Griffin is only partially correct on one count.

A search of a home will usually be more intrusive than a supervisory visit. This does not minimize the intrusive-

ness of the home visit, because it, too, implicates third parties and may require the probationer to open to view nearly as much of his home as would be open in a search. Even a limited search may be a substantial invasion of privacy. *New Jersey v. T.L.O.*, 469 U.S. at 337. And of course, any search, even if conducted with a warrant, must be reasonable and should be no more intrusive as is necessary to achieve its purpose.

Even the search of T.L.O.'s purse, though it was not a search of her residence, was not minimally intrusive. *New Jersey v. T.L.O.*, 469 U.S. at 355 (Brennan, J., concurring in part and dissenting in part). Any entry into the home by a government official is a substantial intrusion and petitioner's attempt to minimize the intrusiveness of the home visit is not convincing.

On the other two counts Griffin utterly fails to persuade. The search function is also directly related to the agent's supervisory functions. And Griffin is wrong on the facts regarding the third point. The search of his apartment was not for the explicit purpose of obtaining evidence of the commission of a crime; it was for the purpose of verifying the truth of an allegation that he was violating a condition of a probation, which also happened to be a crime. If Griffin had not been a convicted felon, his possession of firearms would still violate his probation in the absence of prior authorization to possess them. The probation agent would still likely have wanted to search his home, even though no criminal prosecution could be the result. That the violation here turned out to be criminal conduct should not dilute the agent's authority to verify compliance with the conditions of probation. And it is not the probation authority who decides to charge

a new criminal offense (as opposed to revocation). That decision is for the district attorney.

Petitioner views the relationship of the probationer and his agent as an adversarial one, at least when it comes to a search. This approach is wrong. The relationship between a community corrections officer and the client has been characterized as "a special one." *Latta v. Fitzharris*, 521 F.2d at 250; *State v. Earnest*, 293 N.W.2d at 368. One cannot separate the little-used search powers of the probation agent from the totality of the agent's duties. The community corrections officer serves as a counselor, a caseworker, a confidant, an investigator, a guide, and a host of other functions that unite the dual nature of the task: rehabilitation as well as protection of the public.

The administrative rules that govern searches of probationers in Wisconsin are a model of fairness and offer adequate protection against unreasonable intrusions. They balance the legitimate concerns of the probation authority against the privacy rights of the probationer. If petitioner is concerned about an adversarial and possibly hostile relationship between the agent and the client, the rules protect him. Searches must ordinarily be authorized by the agent's supervisor, one who will be neutral and detached from any personal difficulties between the primary agent and the client. Therefore, a probation search will not be the product of the unreviewed "discretion of the official in the field." *Camara v. Municipal Court*, 387 U.S. at 532. Mr. Lew, who carried out the search, was not Griffin's agent but was the agent's supervisor.

The rules exhort the probation authorities to preserve the dignity of clients. Indeed, the published com-

ments urge the probation officer to consider "the possible effects of a search on a client's rehabilitation, or family and peer relationships."

3. As a practical matter, the probable cause standard of suspicion is ill-suited to the context of probation searches.

Ordinarily a search, even one that may permissibly be carried out without a warrant, must be based on "probable cause" to believe that a violation of the law has occurred. *New Jersey v. T.L.O.*, 469 U.S. at 340. However, "probable cause" is not an irreducible requirement of a valid search. *Id.*

How shall a court determine when probable cause is not an appropriate standard of suspicion, when some lesser standard is more fitting? When a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, this Court has not hesitated to adopt such a standard. *New Jersey v. T.L.O.*, 469 U.S. at 341.

In discussing the need for close supervision of probationers, the Wisconsin Supreme Court has observed that the probation officer cannot maintain a personal surveillance over each client. "He must depend on reports from others, oftentimes anonymous, which the officer must check out." *State v. Evans*, 77 Wis. 2d at 231, 252 N.W.2d at 626-67. It is neither realistic nor good corrections practice to expect a probation officer to first question and authenticate a tip that a probationer may have guns before acting. Was Mr. Lew powerless to act because the information he had fell short of "probable cause"? The

stakes are too high; society demands that the officer check out such a disturbing report. A warrantless search, limited to checking out the report of firearms, is not only reasonable, it is essential to the system of probation itself.

The probationer does not stand on the same footing as the ordinary citizen when it comes to assessing dangerousness to the community. The probationer, like the incarcerated prisoner, has demonstrated a proclivity for antisocial criminal conduct and a lapse in ability to control and conform behavior to the legitimate standards of society. *Hudson v. Palmer*, 468 U.S. at 526. Incarceration may not be necessary to protect public safety but supervision is. That supervision would be severely hampered by the probable cause level of suspicion.

This Court in *New Jersey v. T.L.O.* did not decide whether an individualized suspicion is an essential element of the reasonableness standard for school searches because the search of T.L.O.'s purse was based on such an individualized suspicion that she had violated a school rule. Because the search of Griffin's residence was based, at least in substantial part, on an individualized suspicion that he may have had weapons, this Court need not decide whether a more general suspicion, based perhaps solely on statistical probabilities or simply a review of a probationer's criminal history, would permit a warrantless search. Of course, it is likely that Mr. Lew considered Griffin's lengthy criminal record in deciding to act on the individualized report suggesting that Griffin had guns in his apartment.

In *New Jersey v. T.L.O.*, the Court declined to adopt a standard of suspicion that would vary with the relative

importance of the school rules. 469 U.S. at 342 n.9. However, the Court suggested that in the school context the nature of the infraction is a legitimate factor in assessing reasonable suspicion. The Court need not reach that issue here because the condition that Griffin was reported to have violated (and did violate) was unquestionably important. A report of a felony probationer—and it matters not that Griffin's current probation was for misdemeanors—in possession of a gun is a "worst case scenario" requiring decisive action on a minimum of direct evidence. Weapons pose a direct and substantial danger to the public and to rehabilitation.

4. Police cooperation or participation does not invalidate a probation search initiated or conducted by the probation authority.

Griffin alleges that removal of the warrant requirement and the probable cause level of suspicion invites abuse by the police and further charges that the police here acted improperly. Not so.

The probation authorities were not looking for innocent and harmless items. They had information that the petitioner had firearms in his residence. It would have been reckless and foolhardy for Mr. Lew not to have sought police protection.

Lower courts that have considered the issue have found that where the search is initiated by the probation officer, cooperation between the probation officer and the police does not make the search illegal. *State v. Gardner*, 619 P.2d at 851; *State v. Pinson*, 657 P.2d at 1101; *State v. Simms*, 516 P.2d at 1095; *Owens v. Kelley*, 681 F.2d at 1369; 4 LaFave at § 10.10(e).

Another facet of this issue is the reasonableness of acting on a tip provided by a police officer. "However, under the reasonable suspicion standard, searches have generally been upheld where the parole officer's suspicion is based on a tip by an anonymous informer, the police, or other sources." *State v. Velasquez*, 672 P.2d at 1262; *State v. Earnest; State v. Pinson; United States ex rel. Santos v. New York State Board of Parole* (tip by local detective).

Professor Ringel notes: "However, when police have given sufficient information to lead the parole or probation officer to believe that a violation of the conditions of parole or probation is occurring, the parole or probation officer may conduct a search based upon that information, even with police participation." 1 W. Ringel, *Searches & Seizures, Arrests and Confessions* § 17.3, at 17-14-6 (2d ed. 1986) (and cases cited).

Professor LaFave writes:

> Generally, it may be said that searches of probationers and parolees not conforming to usual Fourth Amendment standards have been upheld notwithstanding the fact that there was some degree of cooperation or joint participation by the police and a probation or parole agent. There is little reason to question this result when the facts show that police participation was brought about at the instigation of the probation officer or parole officer, for "he may enlist the aid of police officers in performing his duty."

4 LaFave § 10.10(e), at 155-56 (footnotes omitted).

This Court need not decide if the probationer's reduced expectation of privacy extends directly to the police so that the police may independently search the proba-

tioner's residence without a warrant or probable cause. As far as the State of Wisconsin is concerned, that type of search is not covered by the administrative rules that cover the kind of search that uncovered the illegal .357 Magnum in Griffin's apartment.

C. Applying the law to the facts of the case, the search of Griffin's apartment was reasonable under the Fourth Amendment.

Applying the law to the facts requires two inquiries: did the probation authority have reasonable suspicion and was the search a probation search or simply a subterfuge for a police search?

Although Mr. Lew could not recall the name of the police officer who told him that Griffin may have had guns in his apartment, the trial court found that the source of information was a detective in the Beloit Police Department. Mr. Lew could reasonably rely on that source, especially in combination with his assessment of Griffin's lengthy criminal record. The question is this: did Mr. Lew have enough information to justify his search? Considering the nature of the reported violation, the source of the report, and Griffin's lengthy criminal record, Mr. Lew's actions were justified at their inception. *New Jersey v. T.L.O.*, 469 U.S. at 341-42. He had reasonable suspicion.

The nature of the police involvement in this case presented the trial court with another question of fact which was resolved against the petitioner. Mr. Lew, the probation officer's supervisor, made the decision that Griffin's residence should be searched. He requested the police

to accompany him for the purpose of protection. The record supports that conclusion.

Although the police officers may have assisted in the search by pointing in the general direction of the table where the .357 Magnum was found, this assistance does not detract from their purpose in going to petitioner's residence with Mr. Lew.

CONCLUSION

For the reasons stated, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 86-5324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH G. GRIFFIN,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. RESPONDENT HAS NOT DEMONSTRATED THAT THE NATURE OF PROBATION JUSTIFIES THE WARRANTLESS SEARCH OF A PROBATIONER'S HOME

Respondent's argument based upon the "context" of the search in this case consists of repeated strained attempts to put square pegs into a round hole. Griffin was not an illegal alien trying to cross the border into this country. The search in this case does not involve the mere inventorying of the contents of a trunk of an impounded vehicle. Griffin was not incarcerated in a cell, he was not engaged in some pervasively regulated commercial enterprise whose premises were being searched by civil authorities for non-criminal purposes, and he certainly was not a child in attendance at a public school. The essential point on which the respondent's argument goes astray is its complete failure to recognize the single most critical aspect of the "context" of the search before this Court, namely, that it took place in Griffin's own home. In *that* context, this Court has repeatedly emphasized that both a warrant and probable cause are required before such a search may be made.

Thus, respondent's comparison of Griffin to a school child is both disengenuous and beside the point. (Respondent's Brief, pages 25-26) Initially, the relevant comparison would have to be between Griffin's Fourth Amendment rights and those of a child in the child's own home, not while attending a public school. This Court's decision in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), as discussed in petitioner's Brief, was limited very carefully to the situation of the search of a child *in the public school setting*. None of the reasons for justifying that sort of search are present when the search in question is that of a person's own home.

More fundamentally distrubing about respondent's argument is its explicit assertion that it is petitioner's status as a convicted criminal, as distinct from that as a probationer, which provides justification for doing away with the warrant and probable cause requirements. Respondent argues that it is the risk posed by probationers which is essential to this Court's analysis, and that the risk comes from the fact that probationers are convicted criminals. (Respondent's Brief, page 26) Respondent even goes so far as to argue that it was irrelevant that Griffin was on probation for misdemeanors, because Griffin had felony convictions in his past. (Respondent's Brief, page 38)

Basing the argument of risk upon a probationer's underlying criminal convictions implies both that the Fourth Amendment will have to be tailored to fit the individual criminal record of each and every individual probationer, and also proves too much. After all, it is not merely those convicted criminals who are on probation or parole who pose risks. There are many persons at large in the society who have been convicted of crimes in the past, including crimes far more numerous and serious than those of Griffin's, who are no longer, or never have been, on probation or parole. If Griffin's criminal record created a risk which justified doing away with normal Fourth Amendment protections, than so does the record of all these other persons. The argument urged upon this Court by respondent would entail that all convicted criminals, due to their risk to society, would suffer the loss of normal Fourth Amendment protections urged by respondent, even when present in their own homes. Indeed, respondent's argument applies even more forcefully to persons who are not put on probation or parole, since presumable probationers and parolees represent the lowest level of

risk among convicted criminals, or they would not have been put on probation or parole in the first place.

As with the option of the Wisconsin Supreme Court, the argument of respondent is replete with assertions that the supervisory functions inherent in probation require, and justify, the elimination of the warrant requirement, but is devoid of any cogent answer to the simple question of why that should be so. In modern society, with numerous judges, rapid transportation and electronic communications, the process of obtaining a warrant is neither difficult nor time consuming. When a probation officer wishes to search a probationer's home for evidence which will establish that the probationer committed a crime, the probation officer is no longer fulfilling the counseling or rehabilitative aspects of his or her job. Unlike the situation in school or commercial enterprise administrative searches, the probation officer is engaging in a course of conduct which is intended to directly result in adversary proceedings being instituted against a probationer, which may well result in the probationer being incarcerated. At that point, the probation officer has functionally become a law enforcement officer for the state, and it is at that point at which it is impertive that the shield of the warrant requirement, which ensures that the decision to search will be made by a neutral and detached magistrate, be interposed between the probation officer and the probationer.

Under this Court's existing decisions, the probation officer can always seek the probationer's consent to the specific search in question, and, in any event, if a true emergency situation exists, the probation officer could proceed with the search without first obtaining a warrant. Professor LaFave persuasively argues that "Full searches of the home, unlike the home visit it was earlier

concluded should be allowed without a warrant, should be neither frequent nor a matter of routine." (4 W. LaFave, *Search and Seizure* § 10.10, at 148) Respondent concedes this point, as respondent describes the search powers of a probation agent as "little-used." (Respondent's Brief, page 35) In the few situations which would not be covered by existing exceptions to the warrant requirement, it simply makes no sense to assert that requiring the agent to go through the minimal amount of effort required to obtain a warrant will bring the machinery of the probation and parole system in this country to a grinding halt.

Respondent falls back upon the supposed protections provided by the Wisconsin Administrative Code. Initially, this reliance is puzzeling, in that it is irrelevant, since the State of Wisconsin cannot by mere administrative regulation permit that which is forbidden by the United States Constitution.

To the extent that the provisions of the administrative rules are relied on to establish a diminished expectation of privacy on the part of probationers, the respondent's argument is circular. As Professor LaFave has aptly pointed out

> It must be emphasized, however, that this "reduced expectation of privacy" statement is a conclusion rather than a justificaion, and that it would be a perversion of the expectation of privacy analysis in *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), to say that the government may first destroy a probationer's or parolee's expectation of privacy by telling him at the time of release that he is subject to search at any time and then later conduct searches at will on ground that no intrusion into an expectation of privacy had occurred.

LaFave, supra, at 137.

Finally, as respondent recognizes, these rules are nothing more than "exhortations" (Respondent's Brief,

page 35) to probation authorities to do the right thing. Respondent's highly idealized view of the relationship between a probation officer and probationer bears little relation to the practical realities of the criminal justice system as it exists today in this country. Furthermore, to assert that a probation supervisor is "neutral and detached" (Respondent's Brief, page 35) is akin to suggesting that a police lieutenant is a "neutral and detached" overseer of the activities of police officers in the field. When, as in this case, the issue is searching a probationer's residence for evidence of the commission of a crime, the hat being worn by the probation officer has a badge on it; when the goal is obtaining evidence to justify the incarceration of a probationer, there is no doubt that the relationship has become as adversary as it can get.

In those circumstances, the supposed protections provided by the administrative rules are frail indeed, as demonstrated in the case before this Court. As was convincingly demonstrated by Justice Bablitch in his dissent, the search in this case did not satisfy a single one of the nine standards set forth in Wis. Adm. Code Section HSS328.21(6). *State* v. *Griffin*, 131 Wis.2d 41, 388 N.W.2d 535, 545-546 (Bablitch, J., dissenting). Nonetheless, the search was authorized by the supposedly neutral and detached probation supervisor, was accomplished with the active assistance of the police, based upon information provided by the police, and was upheld by the Wisconsin Supreme Court. It is therefore evident that the Wisconsin Administrative Code is not a viable substitute for the Fourth Amendment of the United States Constitution.

II. RESPONDENT HAS NOT DEMONSTRATED THAT THE SEARCH OF A PROBATIONER'S HOME SHOULD BE PERMITTED ON LESS THAN PROBABLE CAUSE

Respondent's argument in this regard is essentially a restatement of the arguments in favor of doing away with

the warrant requirement. Respondent's arguments are therefore inapposite, since, as was demonstrated in our Brief, the probable cause requirement of the Fourth Amendment protects very different concerns than the warrant requirement, and the analysis of when the probable cause requirement should be done away with is likewise very different.

In particular, respondent focuses most directly upon dangerousness, or risk, as a justification for doing away with the probable cause requirement. If respondent's argument were correct, the requirement of probable cause would not be based upon the intrusiveness of the search, as this Court has consistently stated, but upon the nature of the thing to be searched for. In that regard, the probation or parole status of the person whose home is to be searched is completely irrelevant. A report to the police that any person was in unlawful possession of a firearm, or a bomb, or heroin, or counterfeit money, or any of the host of other items of contraband or evidence of serious crime, is always disturbing. Nonetheless, the framers of the Constitution made no exception to the probable cause requirement for those cases which the police find particularly disturbing. If the information is such as to reasonably require immediate action, that is an exigent circumstances argument, and goes to the necessity of obtaining a warrant; it has nothing to do with the probable cause requirement. Even searches of a home based upon exigent circumstances nonetheless require probable cause. Society is equally at risk from convicted criminals who are no longer, or never have been, on probation or parole, as from those who are, and yet presumably the government would not argue that that risk would justify searches of those persons' homes on less than probable cause. Allowing searches on less than probable cause

would always make law enforcement easier, but this Court has consistently refused to sanction them, in cases up to an including charges of murder. Respondent have advanced no cogent reason why Griffin's status as a probationer on three petty misdemeanors should deprive him of the protections afforded by the probable cause requirement.

As discussed in Griffin's Brief, respondent's reliance on *T.L.O.*, *supra*, is inapposite, particularly because *T.L.O.*, *supra*, did not involve an adversarial search aimed towards obtaining evidence of a crime, and this Court's decision in *T.L.O.*, *supra*, furnishes no support for respondent's contention.

III. RESPONDENT HAS NOT DEMONSTRATED THAT THE SEARCH OF GRIFFIN'S HOME WAS BASED UPON PROBABLE CAUSE, OR EVEN REASONABLE SUSPICION

Both probable cause and reasonable suspicion must be based upon specific, articulable *facts*. All the probation supervisor knew in this case was that some unknown person has supposedly told some unknown police officer, at some unknown time, that Griffin *may* have had a gun in his house. The credibility and reliability of the ultimate source of this information was unknown, and passing it through a police officer could not, and did not, cure any of its defects. The fact that the police chose to pass this information on to the probation authorities, rather than act upon it themselves, shows both their knowledge that it was inadequate to support a warrant for the search of Griffin's home, and their desire to circumvent that problem by having the probation authorities do the job for them. Nothing in this case establishes reasonable suspicion, much less probable cause, for either the police or the probation authorities to search Griffin's home.

CONCLUSION

For the reasons set forth in Griffin's Brief and this Reply Brief, this Court should grant the relief requested in petitioner's Brief.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 86-5324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH G. GRIFFIN,

Petitioner,

—v.—

STATE OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WISCONSIN FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules and Regulations

Secondary Sources

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a national organization comprising more than 250,000 members. The American Civil Liberties Union of Wisconsin Foundation is the Wisconsin affiliate of the ACLU with over 3,500 members statewide. The ACLU and its affiliates have been traditionally devoted to the protection and enhancement of fundamental liberties and basic civil rights. Among the most fundamental of liberties is the Fourth Amendment "right of the people to be secure in their ... houses ... against unreasonable searches and seizures ...."

In the present case, the Wisconsin Supreme Court has upheld the search of a home by law enforcement officials without a warrant, consent or exigent circumstances. In so doing, the Court recognized that it was creating a new exception to the warrant re-

quirement of the Fourth Amendment. It is the position of amici that no new exception to the warrant requirement of the Fourth Amendment should be created or can be justified under the facts and circumstances of this case.

With the consent of the parties indicated in letters being lodged with the Clerk, amici respectfully submit this brief to advance their position to the Court.

STATEMENT OF THE CASE

This case involves a law enforcement search of a home by probation officers in the absence of a warrant, consent or exigent circumstances.

During the morning of April 5, 1983, Michael Lew, a probation officer employed by the Wisconsin Bureau of Community Corrections, received a phone call from the City of Beloit Police Department. The caller[1/] suggested to Officer Lew that Joseph Griffin, an individual then under probationary supervision, "may have had guns" at his home.

After receiving this initial phone call from the Police Department, Officer Lew waited two to three hours before making fur-

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1/ Officer Lew could not recall the name of the City of Beloit police officer who provided the information. He believed that the information was possibly provided by Captain Truett Pittner. Captain Pittner testified, however, that he did not recall contacting Officer Lew regarding the search of Mr. Griffin's residence.

ther arrangements with the Police Department for the purpose of providing officers to accompany him and another probation officer, Joanne Johnson, to the home of Mr. Griffin. Arrangements were made, however, and later in the day of April 5, Officers Lew, Johnson and three officers from the Beloit Police Department went to the residence of Mr. Griffin. Before going to the Griffin household neither Officer Lew nor any other probation officer nor any police officer attempted to secure a search warrant from a judge or magistrate.

Upon arriving at the Griffin house, Officer Lew approached the door and met Mr. Griffin. Mr. Lew introduced himself as a probation officer[2/] and identified the other officers as well. At this time, Mr. Lew also announced: "We are going to search [the]

[2/] Neither Mr. Lew nor Ms. Johnson were directly responsible for Mr. Griffin's probationary supervision.

residence." After this exchange at the door, all five officers entered the Griffin home where they met Tanya Turner, a woman with whom Mr. Griffin lived. The police officers remained with Ms. Turner in the living room. Officers Lew and Johnson then searched the entire house.

During the course of the search, the officers found a handgun in a table drawer located in the living room. They also found a quantity of marijuana in the foyer. Upon discovery of the gun, Officer Lew directed the police officers to arrest Mr. Griffin.

On April 11, 1983, a criminal complaint was filed against Mr. Griffin charging him with possession of a firearm and possession of a controlled substance. The defendant moved, inter alia, to suppress all evidence obtained during the search. The motion to suppress was denied by the trial court. The evidence obtained from the search was admit-

ted into evidence at a jury trial. After trial, the jury found the defendant guilty of possession of a firearm. The charge of possession of a controlled substance was dismissed.

On appeal from the conviction, Mr. Griffin continued to assert that: (1) the warrantless search of his home violated the Fourth Amendment; (2) even if a warrantless search were constitutionally acceptable the search conducted here was undertaken upon less than probable cause and such a search violates the Fourth Amendment; and (3) the search in this case did not even satisfy the "reasonable grounds to believe" standard imposed by Wisconsin Department of Health and Social Services regulations.[3/] A divided

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[3/] Section 328.21(3)(a) of the Wisconsin Administrative Code purports to authorize probation officers to search a probationer's residence "if there are reasonable grounds to believe that the quarters ... contain contraband."

Wisconsin Court of Appeals upheld the legality of the search, State v. Griffin, 126 Wis.2d 183, 376 N.W.2d 62 (1985), as did a divided Wisconsin Supreme Court, State v. Griffin, ____ Wis.2d ____, 388 N.W.2d 535 (1986).

SUMMARY OF ARGUMENT

The right of privacy within the home stands at the very heart of the Fourth Amendment. To guarantee this fundamental right the Court has consistently held that, absent consent or exigent circumstances, "the entry [by government officials] into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." Steagald v. United States, 451 U.S. 204, 211 (1981).

In the present case, the Wisconsin Supreme Court has upheld the search of a probationer's home by probation officers who were performing law enforcement functions and who were proceeding without a warrant, consent or exigent circumstances. In so doing, the Wisconsin Court recognized that it was creating a new exception to the warrant requirement of the Fourth Amendment. The Court appeared to base its conclusion upon

two interrelated grounds: First, given the "nature of probation", State v. Griffin, 388 N.W.2d 535, 541 (1986), a probationer can have no legitimate expectation that he or she will remain free from warrantless searches of the home. Second, warrantless searches by probation officers are essential to effective supervision.

Neither of these reasons can survive careful analysis. The claim that a probationer can have no legitimate expectation that he will remain free from warrantless searches of the home is inconsistent with the core principles and values articulated by this Court's Fourth Amendment jurisprudence. The claim drastically undervalues the importance that our society and this Court's Fourth Amendment rulings give to the concept of domestic privacy. The claim undervalues, as well, the importance of the warrant requirement itself and the decisions of this Court

which carry the Fourth Amendment warrant requirement even beyond the confines of the home to commercial property. Finally, this claim unreasonably discounts the privacy interests shared by friends and family members who reside with probationers.

The second rationale of the Wisconsin Supreme Court is equally flawed. In the context of warrantless searches of the home this Court has never weighed the interests of administrative efficiency against the privacy rights of the individual. Given the primacy of the right of domestic privacy within our Fourth Amendment jurisprudence, such a calculus does not seem appropriate. But even if appropriate, the Wisconsin Court provided no real support for its conclusion that the practice of conducting warrantless searches is essential to the administration of a probation system. It provided no empirical data to justify the claim that warrantless

searches are essential to the rehabilitative goals of probation. Moreover, such a contention conflicts with common intuition. For, if anything, warrantless searches of the home undermine the trusting relationship that should exist between the officer and the probationer if probation is to fulfill its proper rehabilitative role.

Finally, the claim that warrantless searches by probation officers are essential to the reasonable administration of a probation system is further undercut by examining the operation of the federal probation system which does not permit probation officers to conduct warrantless searches within the homes of probationers. See U.S. Parole Commission, Rules and Procedures Manual § 2.40-14(d) (Nov. 4, 1985). There is no evidence that this limitation has incapacitated federal probation offices from the proper administration of their responsibilities.

Although rejected by the court below, other courts have invented legal fictions to justify warrantless searches of the homes of probationers and parolees. The fictions most frequently invoked are commonly described as the "constructive custody" theory and the theory of "implied waiver."

Under the "constructive custody" theory, it is asserted that probation is simply a form of "jail on the street" and that, therefore, the Fourth Amendment rights of probationers should be measured by referring to the rights of prisoners. This theory ignores the real and substantial differences between the life of a probationer and that of a prisoner. Indeed, the life of a probationer comes much closer to resembling the life of an ordinary citizen than that of a prisoner.

The "waiver" theory is similarly without merit. It ignores the inherently coercive nature of probation and the clear holding of

this Court that the waiver of Fourth Amendment rights must be entirely uncoerced and voluntary. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

In short, there is no justification in law or policy for creating a new exception to the Fourth Amendment warrant requirement in this case. These matters will be amplified in the Argument below.[4/]

[4/] In focusing upon the warrantless quality of the search in this case, amici do not mean to suggest that petitioner's other claims relating to the constitutional deficiencies of the instant search are without merit. Indeed, law enforcement searches for criminal contraband, whether conducted in accordance with the warrant requirement or pursuant to one of its exceptions, are "reasonable" under the Fourth Amendment only if based upon "probable cause." Beck v. Ohio, 379 U.S. 89 (1964). Therefore, even if a warrantless search of a probationer's home is constitutional, the lower court decision should, nonetheless, be reversed upon the ground that the search at issue here was not supported by "probable cause."

ARGUMENT

I. WARRANTLESS SEARCHES OF THE HOME VIOLATE THE FOURTH AMENDMENT UNLESS UNDERTAKEN WITH CONSENT OR PURSUANT TO EXIGENT CIRCUMSTANCES

The personal freedoms guaranteed by our federal Constitution embody fundamental values respecting the relationship between government and its citizens. Among the values most deeply rooted within our common law, our common culture, and our constitutional tradition is the notion that the home serves as a vital sanctuary of personal privacy. As early as 1886, this Court spoke of "[t]he sanctity of a man's home" and "the privacies of life," Boyd v. United States, 116 U.S. 616, 630 (1886), and demonstrated that privacy and the home are closely bound together as a matter of cultural expectations as well as constitutional doctrine. Thus, whatever may be the outer reaches of Fourth

Amendment jurisprudence, the right of privacy within the home lies at or near its core.

The Court's opinions have reflected this sensibility on many occasions. In United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976), the Court observed that "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." In United States v. United States District Court, 407 U.S. 297, 313 (1972), the Court stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." And in Silverman v. United States, 365 U.S. 505, 511 (1961), the Court announced that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Recognizing that the right of the people to be secure in their houses is "basic to a

free society," Wolf v. Colorado, 338 U.S. 25, 27 (1949), the Court has consistently applied a firm rule regarding searches of the home by government officials. The Court has announced that such officials may not search a person's home absent a search warrant, consent or exigent circumstances. See, e.g., Welsh v. Wisconsin, 466 U.S. 740 (1984); Steagald v. United States, 451 U.S. 204 (1981); Mincey v. Arizona, 437 U.S. 385 (1978); United States v. Chadwick, 433 U.S. 1 (1977); Vale v. Louisiana, 399 U.S. 30 (1970); Chimel v. California, 395 U.S. 752 (1969); Camara v. Municipal Court, 387 U.S. 523 (1967). This view was articulated, for example, in Mincey, where the Court observed:

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions" [citations omitted].

437 U.S. at 390.

Moreover, the Court has not limited its affirmation of this Fourth Amendment warrant requirement to residential searches conducted by police officers. The Court has also imposed this requirement upon health and safety officials, see Camara v. Municipal Court, supra, and upon fire officials, see Michigan v. Clifford, 464 U.S. 287 (1984).[5/]

Justice Jackson best described the reason for the Court's firm insistence on a

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5/ Only in Wyman v. James, 400 U.S. 309 (1971) has the Court even permitted a warrantless entry into a residence by a government official. In so doing, the Court emphasized that the entry was undertaken not by a law enforcement official but by a social worker. The Court further noted that the entry was not undertaken to "search" but merely to conduct a "home visit." Accordingly, in reaching its result, the majority opinion stated that "we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." Id. at 317.

judicial warrant as a necessary condition precedent to a search:

> The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by judicial officers, not by a policeman or Government enforcement agent.

Johnson v. United States, 333 U.S. 10, 14 (1948).

The force of this reasoning has not diminished over time. And in recent years this Court has consistently adhered to the principle that a warrantless search of the home represents a fundamental violation of the Fourth Amendment in the absence of consent or exigent circumstances. In Payton v. New York, 445 U.S. 573 (1980), for example, the Court held that the warrantless arrest of a suspect in his home is unconstitutional. Summarizing its ruling, the Court concluded

that "the Fourth Amendment has drawn a fine line at the entrance to the house. Absent exigent circumstances, that threshhold may not reasonably be crossed without a warrant." Id. at 590.

One year later, the Court returned to this theme in Steagald v. United States, 451 U.S. 204 (1981). Unlike Payton, the police in Steagald had an arrest warrant. The defendant's home was searched, however, in the execution of a warrant to arrest a third party. Under these circumstances, the Court held that the arrest warrant was inadequate and a search warrant was necessary because of the privacy interests at stake. Specifically, the Court emphasized that an arrest warrant focused on the rights of the suspect, but did "absolutely nothing to protect [the homeowner's] privacy interest in being free from an unreasonable invasion and search of his home." Id. at 213. Echoing Payton,

Steagald reiterated the Court's guiding view of the Fourth Amendment. "Except in ... special situations," the Court observed, "we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." Id. at 211.

More recently, in Michigan v. Clifford, supra, the Court suppressed the fruits of a warrantless search by fire inspectors inside a home hours after the actual fire had been brought under control. The Court acknowledged that fire inspectors perform a dual function: for safety reasons, they seek to prevent potential fires and to assess the origin of specific fires; as law enforcement officers, they seek to gather evidence of criminal activity when arson is suspected. But the Court rejected the assertion that this dual function permitted fire inspectors

to ignore the warrant requirement. Taking the warrant requirement as a given prior to searching a home, the Court suggested, instead, that the nature of the search might be relevant in determining the level of probable cause. 464 U.S. at 294. Clifford emphasized, however, that the most stringent level of probable cause applies when government officials, whatever their title, are investigating crime with the prospect that the results of their investigation may lead to the incarceration of the individuals under suspicion. Id.

Finally, in Welsh v. Wisconsin, supra, this Court held that, absent exigent circumstances, the warrantless entry into an individual's home to make an arrest for a traffic offense was prohibited by the Fourth Amendment. In reaching this result, the Court once again observed that:

> Prior decisions of this Court ... have emphasized that exceptions to

> the warrant requirement are "few in number and carefully delineated" [citation omitted], and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions ....

466 U.S. at 749-750.

In sum, this Court has consistently held that warrantless searches of the home violate the Fourth Amendment unless undertaken with consent or pursuant to exigent circumstances. There is no reason to deviate from that rule and to create a new exception to the Fourth Amendment warrant requirement in this case.

II. WHERE, AS HERE, A SEARCH WAS UNDERTAKEN WITHOUT A WARRANT, CONSENT OR EXIGENT CIRCUMSTANCES, THE FOURTH AMENDMENT WAS VIOLATED. NO NEW EXCEPTION TO THE FOURTH AMENDMENT SHOULD BE CREATED IN THIS CASE.

There is no dispute but that the search undertaken in this case did not rest upon a warrant or upon any of the recognized exceptions to the warrant requirement. This fact was plainly acknowledged by the Wisconsin Supreme Court. State v. Griffin, 388 N.W.2d 535, 538 (1986). Therefore, in upholding the constitutionality of the search in this case, the state court was constrained to develop a new exception to the warrant requirement.

According to the Wisconsin Supreme Court, this new exception derives from the "nature of probation." Id. at 541. In reaching this conclusion, the Court touched upon two aspects of probation that -- in its view -- justified an abandonment of the Fourth Amendment warrant requirement. The Court's principal reason rested upon the sense that probationers have a diminished expectation of privacy and that this diminished expectation renders warrantless searches constitutionally acceptable. As a related but secondary reason, the Wisconsin Supreme Court seemed to conclude that probation officers

must retain the right to engage in warrantless searches in order to supervise probationers effectively.[6/]

Neither of these reasons can withstand careful analysis. Indeed, there is no justification in law or policy for creating a new exception to the warrant requirement in this case.

A. A Probationer Has a Substantial Expectation of Privacy Within The Home That Society Recognizes as Legitimate

Probationers remain at liberty following their conviction of a crime. In Wisconsin, as in most jurisdictions, probation signifies that a judicial determination has been made

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6/ The Wisconsin Supreme Court declined to rely upon a variety of legal fictions that have been used by other courts to justify warrantless searches of the homes of probationers and parolees. Thus, the Wisconsin Court did not seek to justify warrantless searches upon the claim that probationers are in "constructive custody" or that they may be deemed to have "waived" their Fourth Amendment rights and "consented" to warrantless searches. See Part II.C., infra.

that imprisonment is an inappropriate penalty. Accordingly, probationers are permitted -- indeed encouraged -- to live with family and friends and to form and retain the traditional and enduring attachments of normal life.

In the present case, for example, petitioner Griffin was sharing his home with a female friend and his child. In this respect, it is fair to conclude that petitioner's sense of domestic privacy was no different from that held by other citizens. Nothing in the record of this case suggests that petitioner behaved in a manner inconsistent with this expectation of domestic privacy. Indeed, the Wisconsin Supreme Court did not identify any behavior on the part of Mr. Griffin that would permit the conclusion that petitioner's "subjective"[7/] expecta-

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7/ Tethering Fourth Amendment rights to "subjective" and "objective" expectations of privacy occurred first [footnote cont'd]

tion of privacy was diminished in any respect.

Instead, the court below seemed to base its decision upon the claim that, by operation of law, probationers as a class suffer from a diminution in their "objective" expectation of privacy. In this respect, the state court implicitly concluded that a probationer's expectation that he will remain free from warrantless searches of his home is simply not one which society is prepared to accept as "legitimate". Amici believe that this conclusion is wrong.

Such a conclusion drastically undervalues the importance that our society and

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in Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347, 360-361 (1967). In recent years, however, the Court has appeared to emphasize the "objective" prong of the test. See Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984). Thus, with increasing frequency the predominant question posed by the Court has been whether the expectation of privacy in a particular case is one which "society is prepared to recognize as 'reasonable'", Katz, supra at 360-361, or "legitimate", Smith v. Maryland, 442 U.S. 735, 740 (1979).

our Fourth Amendment jurisprudence bestow upon the concept of domestic privacy. That concept was discussed in Point I above and needs no extensive rehearsal here.

Moreover, if one compares a probationer's interest in domestic privacy with other privacy interests that this Court has found sufficient to trigger the Fourth Amendment's warrant requirement, it is difficult to conclude that probationers can have no legitimate expectation that they will remain free from warrantless searches of their homes. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), for example, an employer's privacy expectation in the "employee area of his business" or "working areas" was sufficient to prohibit warrantless searches by OSHA inspectors. In Michigan v. Tyler, 436 U.S. 499 (1978), a lessee of a burned furniture store had a sufficient privacy expectation to bar fire officials investigating

arson from making warrantless searches of the charred remains. And in See v. City of Seattle, 387 U.S. 541 (1967), a businessman's expectation of privacy in a locked commercial warehouse was sufficient to bar a warrantless search by fire inspectors engaged in a city-wide canvass to obtain compliance with the city's fire code.

If society is prepared to acknowledge the expectations of privacy in commercial premises which, unlike the home, have not been considered to be "at the very core" of the Fourth Amendment, Silverman, 365 at 511, and if the Court is, therefore, prepared to prohibit warrantless searches by fire and OSHA inspectors, it must surely accord similar constitutional protection where, as here, law enforcement officials seek to search the homes of probationers and their family members.

Furthermore, the state court conclusion that probationers can have no legitimate expectation to remain free from warrantless searches ignores the privacy interests of family members or friends with whom probationers typically reside. Such family members and friends are frequently encouraged to share their homes with probationers and, to the extent that the maintenance of family ties furthers the rehabilitative process, it is of benefit to society that they do so. In light of this societal interest, it is senseless for society to turn around and insist that family members living with probationers must also expect to sacrifice their right to remain free from warrantless searches by government officials.

Thus, in assessing the privacy rights of probationers within their homes the concomitant rights of persons living with probationers should not be ignored. For to hold

that probationers, as a class, have no legitimate expectation to remain free from warrantless home searches requires that we conclude, as well, that persons living with probationers can have no legitimate expectation that they will remain free from warrantless intrusions. This is an unreasonable and undesirable result.

B. Warrantless Searches By Probation Officers Are Not Essential To Effective Supervision

In upholding the warrantless search in this case the Wisconsin Supreme Court apparently balanced the probationer's interest in domestic privacy against the state's interests in administering its probation system. In this regard, the Wisconsin Court concluded that "[i]t is the nature of probation and the duties placed on probation that justify such searches." State v. Griffith, supra, 388 N.W.2d at 541.[8/]

In the context of searches of the home, this Court has never balanced administrative interests against the privacy rights of the individual the way the Wisconsin Court did here. Given the primacy of the home within our Fourth Amendment jurisprudence, such a calculus is not appropriate. But even if proper, the Wisconsin Supreme Court provided no support for its conclusion that the practice of conducting warrantless searches is essential to the administration of a probation system.

Were it appropriate to engage in such a calculus in the context of a home search, the question the Wisconsin Court would have had to ask was whether the Fourth Amendment war-

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[8/] The Wisconsin Supreme Court opinion reached this conclusion without much explanation. Thus, it is unclear as to how the Wisconsin Court engaged in this calculus. It is also unclear whether the Court undertook this balancing test as part of its evaluation of whether probationers have a legitimate expectation of privacy.

rant requirement is fundamentally incompatible with administrative interests that the state must pursue. For when engaging in such inquiries in other contexts, this Court has consistently held that Fourth Amendment privacy interests must be respected to the degree that such interests are not fundamentally incompatible with powerful administrative needs. New Jersey v. T.L.O., ___ U.S. ___, 83 L.Ed.2d 720, 735-736 (1985); Hudson v. Palmer, supra, 468 U.S. at 523.[9/]

If the Wisconsin Court had framed the inquiry in these terms it would have concluded that no fundamental incompatibility exists between a probationer's interests in

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9/ In New Jersey v. T.L.O., supra at 735-736, the Court urged resolution of the Fourth Amendment issue in such a way as to "ensure that the [privacy] interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." In Hudson v. Palmer, supra at 523 the Court noted: "[W]e have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."

remaining free from warrantless home searches and the state's reasonable administrative needs. This is so because warrantless searches by probation officers are simply not essential to the reasonable administration of a probation system.

The Second Circuit, which addressed this precise question in United States v. Rea, 678 F.2d 382 (2d Cir. 1982), supports this conclusion. The Court in Rea stressed that even a probationer "retains ... the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." Id. at 386 (citations omitted). And it concluded that probation and retention of the right to remain free from warrantless searches were not inherently incompatible. In this regard, the Court specifically rejected the claim "that requiring a probation officer to obtain a warrant prior to searching a probationer's home would interfere in

any significant way with the dual rehabilitative and law enforcement functions of the probation officer." Id. at 387.

Further analysis of the dual functions of probation reinforces the correctness of the Second Circuit decision.[10/] As the Rea court observed, probation officers generally perform a rehabilitative function by serving as counselors or advisors for probationers. The officers are also required to serve a policing function designed to prevent probationers from committing further crimes.

Surely, the State of Wisconsin does not claim that warrantless searches are necessary to permit probation officers to perform their policing functions more efficiently. For if efficient law enforcement requires the abandonment of the Fourth Amendment's warrant requirement in some home searches, such a justification can be applied more generally to all law enforcement searches. This Court, however, has never accepted law enforcement efficiency as a reason to permit warrantless searches of a home absent exigent circumstances. Indeed, the Court has observed that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." Mincey, 437 U.S. at 393 (emphasis supplied).

Therefore, if probation officers are to be treated any differently from other law enforcement officials for Fourth Amendment purposes, the distinction must somehow rest upon the claim that limiting the officers' capacity to conduct warrantless searches will undercut the rehabilitative purposes of probation. But, in fact, there is no evidence to support such a claim. The Wisconsin Supreme

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10/ See also United States v. Workman, 585 F.2d 1205 (4th Cir. 1978); United States v. Bradley, 571 F.2d 787 (4th Cir. 1978); but see, United States v. Scott, 678 F.2d 32 (5th Cir. 1982); Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975).

Court has pointed to none. Indeed, such a claim seems essentially counter-intuitive.

This is so because the requirement that warrants be obtained prior to searching a probationer's home can be said to interfere with the helping function of probation only if it is assumed that warrantless searches promote a probationer's rehabilitation. In this respect, it is hard to see how warrantless searches of the home enhance a probationer's familial relationships, improve his financial security or employment opportunities, or upgrade his housing. If anything, such searches undermine the trusting relationship that should exist between the officer and the probationer if probation is to fulfill its proper rehabilitative role.11/

11/ Studies of the parole officer-parolee relationship suggest that excessive surveillance -- including unannounced searches -- by a parole officer impedes the establishment of a trusting relationship between parole officer and parolee. See, D. Stanley, Prisoners Among Us, The Problems of Parole, 100-101 [footnote cont'd]

So understood, warrantless searches are, in all likelihood, dysfunctional to the rehabilitative purposes of probation.

Moreover, in considering the impact of a warrant requirement upon the ability of probation officers to monitor the activities of probationers, it is useful to remember that barring warrantless searches is not the same as barring all searches. As this Court noted in Camara v. Municipal Court, supra at 533: "[t]he question is not ... whether these inspections may be made, but whether they may be made without a warrant."12/ A warrant requirement simply serves as a procedural check

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(1976); E. Studt, Surveillance and Service in Parole: A Report of the Parole Action Study 78-79 (1972).

12/ A warrant requirement would also not disable probation officers from using other techniques that permit the officers to monitor the activities of probationers. A probation officer could still require probationers to attend regular meetings with probation officers. They could still visit the probationers at their places of employment. They could still interview the probationers' employers as well as members of the probationers' families.

against the broad discretionary authority possessed by probation officers. As the Second Circuit wrote in Rea, supra at 387: "We are unaware of any means, other than the warrant requirement, by which the right to be free of unreasonable searches can be effectively protected."

Finally, in support of the conclusion that warrantless searches are not essential to the reasonable administration of a probation system, it is worth examining the practice of federal probation officers. Simply stated, the United States Parole Commission does not permit probation or parole officers to conduct warrantless searches. See U.S. Parole Commission, Rules and Procedures Manual § 2.40-14(d) (Nov. 4, 1985).[13/] And there is no evidence that this limitation has

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13/ Section 2.40-14 of the U.S. Parole Commission Rules and Procedure Manual (Nov. 4, 1985) is set forth in an Appendix to this Brief.

incapacitated federal probation officers from the proper administration of their responsibilities.

C. Legal Fictions Created To Justify Warrantless Searches By Probation and Parole Officers Do Not Withstand Careful Analysis Or Realistic Appraisal

In its opinion, the Wisconsin Supreme Court noted that some courts have created legal fictions to justify warrantless searches of the homes of probationers and parolees. State v. Griffin, supra, 376 N.W.2d at 67 n.4. The fictions most frequently invoked are commonly described as "the constructive custody" theory and the rationale of "waiver." The Wisconsin Court was correct to reject these inventions because neither of these theories can withstand careful analysis or realistic appraisal.

1. Constructive Custody

Under the "constructive custody" theory, probation and parole are considered simply a form of "jail in the street" and, therefore, the Fourth Amendment rights of probationers and parolees must be measured by reference to the rights of prisoners. See, e.g., People v. Hernandez, 229 Cal.App.2d 143, 40 Cal.Rptr. 100 (1964); People v. Santos, 31 A.D.2d 508, 298 N.Y.S.2d 526 (1969), aff'd, 25 N.Y.2d 976, 305 N.Y.S.2d 365 (1969). Since prisoners have no Fourth Amendment rights in their cells, see Hudson v. Palmer, supra, so the argument goes, the constitutional privacy rights of probationers should be comparably diluted -- at least to the extent that no warrant should be required before their homes are searched. See Santos, supra.

There are several short answers to this argument. First, the life of a probationer

is, in virtually every aesthetic, physical and emotional sense, very different from the life of a prisoner. Though both probationers and prisoners are subject to certain legal restraints, in most cases the life of a probationer comes much closer to resembling the life of an ordinary citizen than that of a prisoner.

In this regard, reliance upon Hudson v. Palmer, supra, is clearly misplaced. The holding in that case was explicitly based on the need to maintain institutional security within a prison setting. 468 U.S. at 526-27. Specifically, the Court concluded that the state's indisputable interest in keeping weapons and drugs away from prisoners living side by side in a "volatile" community could not be accomplished "if inmates retained a right to privacy in their cells." Id. This is not to say that the state has no interest in keeping weapons and drugs away

from probationers. But the particular concerns created by a group of prisoners living in close and constantly supervised confinement simply do not apply to a probationer living in his own home like an ordinary citizen.

Another variation on the "constructive custody" theme is the claim that probation is akin to a regulated industry and that, therefore, a probationer's home can be searched without a warrant for the same reason that warrantless searches of regulated industries were upheld by this Court in United States v. Biswell, 406 U.S. 311 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). The doctrine announced in those cases, however, has never been applied to a private home. Given the primacy of the home in Fourth Amendment jurisprudence that distinction should not be lightly dismissed.

Moreover, this Court has been presented with several opportunities to extend the regulatory rationale of Biswell and Colonnade to private dwellings, and has consistently declined to do so. Camara v. Municipal Court, supra, upheld the Fourth Amendment right of a homeowner to deny entry to a housing inspector without a warrant. Recently, in Michigan v. Clifford, supra, the Court ruled that fire officials engaged in a regulatory inspection required a warrant before entering a home.

If a home inspection is truly administrative in nature, a warrant may be obtained on something less than the traditional probable cause standard. See Camara, 387 U.S. at 534-536. An administrative search may not be used, however, as a subterfuge to gather evidence for law enforcement purposes. See Clifford, 464 U.S. at 294. This latter concern is especially serious in the case of government agents like probation officers who

perform a dual function. Id. at 294-95. It is precisely because the line between regulatory inspection and criminal investigation can be easily obscured by "officer[s] engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. at 13, that warrantless home searches have never been allowed, absent exigent circumstances, no matter what title government gives to its law enforcement official.

Applying these principles, it seems clear that where, as here, probation officers entered the home of a probationer in order to search for criminal contraband a warrant based upon "probable cause" was necessary.14/

14/ On the facts of this case, the Court need not reach the question of the appropriate Fourth Amendment standard that would be applied if probation officers sought to enter the probationer's home not to search but to meet with the probationer or his family.

2. Waiver

Some courts have argued that when an individual agrees to enter into a probationary or parole relationship he has implicitly waived his Fourth Amendment rights and constructively consented to submit to warrantless searches by probation or parole officers. See, e.g., United States v. Follette, 282 F. Supp. 10, 15 (S.D.N.Y. 1968). So understood, probation represents a blanket and anticipatory waiver of all Fourth Amendment rights, not only for the probationer but for any person who may reside in the same home with the probationer.

Again, such an argument is unrealistic and at odds with the thrust of this Court's precedent. In Bumper v. North Carolina, 391 U.S. 543, 548 (1968), the Court held that "[w]hen [the state] seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the con-

sent was, in fact, freely and voluntarily given." The determination of voluntariness depends upon the totality of circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In making a judgment about voluntariness, however, "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." Id. at 228.

But a defendant seeking release on probation, like a prisoner seeking release on parole, is in an inherently coercive situation. The overwhelming pressures that operate were aptly described by the District Court in Coleman v. Smith, 395 F. Supp. 1155, 1157 (W.D.N.Y. 1975):

> When Coleman was given the "agreement" to sign, parole had been granted. However parole is characterized, "the liberty is valuable" and a return to a lifestyle approximating normalcy is cherished .... Only Coleman's signature on the dotted line could secure the benefits of parole. A refusal to sign slammed the cell door shut [for] more than eight years .... Under these circumstances, I find sufficient coercion present to invalidate the consent to search executed.

The court in Coleman is not alone in reaching this conclusion. See United States v. Jarrad, 754 F.2d 1451, 1454 (9th Cir. 1985); Dearth v. State, 390 So.2d 108 (Fla.App. 1980); State v. Fogarty, 187 Mont. 393, 610 P.2d 140 (1980) ("choice cannot be termed voluntary when the alternative is prison and even more restrictions"); see generally 4 W. LeFave, Search and Seizure, § 10.10 (1986). To permit an inference of consent in this context "would be no more than a pretext for the unjustified ... intrusion against which the Fourth Amendment is directed." Schneckloth, 412 U.S. at 228.

In short, the fictive theory of waiver -- like the doctrine of "constructive custody" -- ignores reality and the thrust of this Court's precedents. It provides no ade-

quate justification for warrantless home searches of the sort at issue here.

CONCLUSION

The court below clearly recognized that the search at issue here could not be based upon consent or exigent circumstances. Accordingly, it fashioned a new exception to the Fourth Amendment warrant requirement. In this respect the Wisconsin Supreme Court erred, for the new exception it created cannot be supported as a matter of law or policy. The decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

United States Parole Commission
Rules and Procedure Manual
(November 4, 1985)

Section 2.40-14.
Seizure of Contraband in Plain View

(a) Where specifically authorized as a condition of parole (either at the time of release or as a special condition later added) a Probation Officer may require the parolee to surrender to him materials which the Probation Officer believes may constitute contraband and thus a violation of parole conditions (e.g., dangerous drugs, weapons), and which he observes in plain view in the course of his contacts with the parolee. The Commission shall be promptly notified of any such seizure of contraband. A receipt for any material confiscated must be given to the parolee.

(b) Safety of all parties involved, or in the vicinity, is the prime consideration in the seizure of contraband. Thus, any use of force is prohibited and consent to the confiscation is required. Refusal of consent shall be a basis for a request by the Probation Officer for a warrant.

(c) Where possession of contraband material constitutes a criminal offense, such must be reported to the appropriate law enforcement authority with delivery to them of the contraband. Probation Officers should obtain from the law enforcement authorities in their District instruction in proper identification and chain of custody procedures to permit use of the materials for criminal proceedings and/or revocation of parole.

(d) Contraband materials must be in plain view (open sight). Plain view cannot be the result of a search by the Probation Officer. Thus, the Probation Officer may not conduct a search (e.g., enter rooms uninvited or open bureau drawers, glove boxes, or trunks of cars) to cause 'plain view' of contraband articles.

AMICUS CURIAE

BRIEF

No. 86-5324

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOSEPH G. GRIFFIN, Petitioner,

v.

STATE OF WISCONSIN, Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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QUESTION PRESENTED

Should the several states be permitted to adopt the controls on probationers -- such as warrantless search conditions -- that they deem appropriate to the effectiveness and continued availability of their probation programs, so long as these controls and their implementation are reasonable?

TOPICAL INDEX

TABLE OF CASES

TABLE OF CASES (continued)

TABLE OF CASES (continued)

TEXTS, STATUTES & AUTHORITIES

INTEREST OF AMICUS CURIAE

The majority of jurisdictions, including California and Wisconsin, hold that the Fourth Amendment permits probation authorities to search the residences and persons of probationers in the furtherance of the purposes of probation, without obtaining a search warrant and without establishing probable cause that a crime is being or has been committed. We believe this approach is necessary to the continued availability of probation as an alternative to incarceration, and should be affirmed by this Court.

In addition, we believe that this Court should acknowledge that different probation systems have been adopted by the various states, and should permit the states to define the necessary controls on probationers and the appropriate measures to ensure the reasonableness of the controls.

DISCUSSION

THE FOURTH AMENDMENT PERMITS THE SEVERAL STATES TO ADOPT CONTROLS ON PROBATIONERS -- SUCH AS WARRANTLESS SEARCH CONDITIONS -- THAT ARE APPROPRIATE TO THE EFFECTIVENESS AND CONTINUED AVAILABILITY OF THEIR PROBATION PROGRAMS, SO LONG AS THESE CONTROLS ARE REASONABLE IN THE INCEPTION AND IN THE MANNER IN WHICH THEY ARE IMPLEMENTED.

Petitioner proposes that the search warrant and probable cause requirements of the Fourth Amendment be applied to convicted criminals on probation, as though they were ordinary citizens (Petitioner's Brief, at 12, 13). We agree with the Wisconsin Supreme Court and with respondent that the nature of probation precludes such an approach. State v. Griffin, 388 N.W.2d 535, 540-541 (Wis. 1986); Opposition to Petition for Certiorari, at 9.

Probation consists of suspending imposition of sentence or suspending execution of the sentence imposed, and releasing the convicted criminal

conditionally into the community. The overriding justification for probation is that it can be used to facilitate rehabilitation of some criminals more readily than can imprisonment. United States v. Murray, 275 U.S. 347, 357 (1928); United States v. Consuelo-Gonzalez, 521 F.2d 259, 263 (9th Cir. 1975); People v. Edwards, 18 Cal.3d 796, 802, 557 P.2d 995, 135 Cal.Rptr. 411 (1976); People v. Angus, 114 Cal.App.3d 973, 985, 171 Cal.Rptr. 5 (1980); California Pen. Code, § 1203(a); Annot., Probation - Submission to Warrantless Search, 79 ALR3d 1083, 1086 (1977). At the same time, the conditional release of convicted criminals into the community puts the community at risk. United States v. Consuelo-Gonzalez, supra, 521 F.2d 259, 266.

The purpose of the probation condition which authorizes warrantless search is to deter further offenses by the probationer and to ascertain whether the

probationer is complying with the terms of probation.

> "'With knowledge he may be subject to a search by law enforcement officers at any time, he will be less inclined to have narcotics or dangerous drugs in his possession. The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law.' (People v. Kern (1968) 264 Cal.App.2d 962, 965 [71 Cal.Rptr. 105].)" People v. Mason, 5 Cal.3d 759, 763-764, 488 P.2d 630, 97 Cal.Rptr. 302 (1971), cert. den. 405 U.S. 1016.

Use of such conditions may be necessary to the continuing availability of probation as an alternative to incarceration.

"The absence of such controls would unnecessarily increase the hazards to the public resulting from the generous use of probation. This would in turn only create public resistance to such use, and ultimately lead to an increase in the bitter harvest we have come to expect as the consequence of imprisonment." United States v. Consuelo-Gonzalez, supra, 521 F.2d 259, 266.

The vast majority of jurisdictions, including California and Wisconsin, have recognized that the Fourth Amendment is not offended by probation search conditions. Annot., supra, 79 ALR3d 1083, 1087; 4 La Fave, Search and Seizure (2d ed.), section 10.10, at 127-128. In reaching this common conclusion, however, different jurisdictions have employed somewhat different analyses. This is due,

in part, to the different characteristics of probation in the various jurisdictions.

In Wisconsin, the probation search condition is applied by administrative regulation to all probationers. (Opposition to Petition for Certiorari, at 1.) The condition provides for warrantless probation searches on less than probable cause. In Griffin, the Wisconsin Supreme Court found that the probation search condition passed constitutional muster. The Court weighed a variety of factors, including the conditional nature of release on probation, the dual requirements of the probation officer's role (protection of the public; rehabilitation of the criminal), the relationship between the probation officer and his probationer, and Wisconsin's limitations on warrantless probation searches (conducted by probation officers; based on "reasonable grounds" that probationer has contraband; regulated by

administrative guidelines). This approach, which balanced the need to search against the invasion which the search entails, comports with that employed in Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches of residences on less than probable cause) and New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrantless search of student, student's closed purse, or other bag carried by student on school grounds, on less than probable cause).

The California analysis is necessarily different, because California probation is different from Wisconsin probation. In California, probation search conditions do not apply to all grants of probation. People v. Johnson, 43 Cal.3d 296, 316, ___ Cal.Rptr. ___ (1987); People v. Burgener, 41 Cal.3d 505, 532-533, ___ Cal.Rptr. ___ (1986). Rather, the trial court has discretion to impose a probation search condition in a particular case if it is determined to be reasonably related to

the crime of which the offender was convicted and to the potential for future criminality. In re Naito, 186 Cal.App.3d 1656, 1661-1662, ___ Cal.Rptr. ___ (1986). The court also has discretion to select particular aspects of the probation search condition that reasonably relate to the probationer's prior and future criminality. People v. Mason, supra, 5 Cal.3d 759, 763 (warrantless probation search on less than probable cause, after notice to probationer); People v. Guerrero, 85 Cal.App.3d 572, 581, 149 Cal.Rptr. 555 (1978) (warrantless search to be triggered by conduct "reasonably suggestive of criminal activity"); People v. Palmquist, 123 Cal.App.3d 1, 9, 176 Cal.Rptr. 173 (1981) (warrantless search without reasonable cause); People v. Constancio, 42 Cal.App.3d 533, 116 Cal.Rptr. 910 (1974) (probation condition required reasonable cause to initiate probation search). Moreover, the California defendant can

refuse to accept probation on the condition proposed, or can challenge the legality of the proposed condition on an appeal from the judgment or on habeas corpus. People v. Mason, supra, 5 Cal.3d 759, 764. Thus, the California analysis of the validity of probation search conditions takes into account the dual purposes of probation supervision (rehabilitation and deterrence) (5 Cal.3d at 763, 766); the reduced expectation of privacy of the defendant conditionally released to society on probation (5 Cal.3d at 764-765); the defendant's having consented to the condition when he was informed of the proposed conditions (5 Cal.3d at 766); the propriety of the search condition and its terms, given the nature of the defendant's past criminality and potential for future criminality (5 Cal.3d at 764); and limitations on the manner in which the search condition is carried out (5 Cal.3d at 765, fn. 3).

While California's and Wisconsin's analyses of the validity of probation search conditions differ because each reflects differences in their respective probation systems, both comport with the balancing-of-interests approach employed in T.L.O. and in Camara.1/

In United States v. Consuelo-Gonzalez, supra, 521 F.2d 259, 266, the court recognized "that opinions differ as to what [probation] controls are improper," and "express[ed] no opinion here regarding the extent to which the states

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1. The Wisconsin Supreme Court did not rely on the factor of consent (388 N.W.2d 535, 541, fn. 6). Indeed, reliance on consent has been criticized on the ground that consent is coerced where it is given to avoid imprisonment. 4 La Fave, Search and Seizure (2d ed.), supra, at 132-136. The criticism is unwarranted. Informed consent to a probation condition, so as to avoid likely incarceration, is no less voluntary than is a plea of guilty knowingly entered as part of a plea agreement to avoid imposition of a greater penalty. See, Brady v. United States, 397 U.S. 742 (1970) (death penalty); People v. West, 3 Cal.3d 595, 604-608, 477 P.2d 409, 91 Cal.Rptr. 385 (1970).

constitutionally may impose conditions more intrusive on the probationer's privacy than those we here have indicated are proper under the Federal Probation Act." It has long been recognized that the states must have power, within federal constitutional limitations, to develop their own practices and institutions to meet changing social needs. New State Ice Co. v. Liebmann, 285 U.S. 262, 306-311 (1931) (Brandeis, J., dissenting). The continuing wisdom of Justice Brandeis' observation is demonstrated by the California Supreme Court's grant of review on May 16, 1985, in People v. Bravo, 165 Cal.App.3d 741 (1985) (California Supreme Court No. Crim. 23540), which presents the issue of whether a probationer waived the Fourth Amendment probable cause requirement when he accepted a warrantless probation search condition, and by the California Supreme Court's recent opinions in Burgener and Johnson, supra, which reassessed the

constitutionality of universal parole search conditions by application of the T.L.O. analysis, and discarded the consent factor in view of a change in the law making parole mandatory rather than discretionary (41 Cal.3d 505, 529-530, and fn. 12).

CONCLUSION

Striking the balance between probationers' legitimate expectations of privacy and the probation system's equally legitimate need to maintain an environment in which future criminality can be deterred and detected requires an easing of the restrictions to which searches by public authorities are ordinarily subject. Thus, probation officials need not obtain a warrant before searching the residence of a probationer who is under their authority. Moreover, probation officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has

violated or is violating the law. Rather, the legality of such a search for Fourth Amendment purposes should depend simply on the reasonableness, under all the circumstances, of the search. Beyond this, the several states should be permitted to adopt the probation programs best suited to their particular needs, to determine the controls on probationers that are necessary, and to devise the measures that should be taken to ensure that these

controls are reasonably related to the objectives of probation and are not excessively intrusive.

DATED: March 9, 1987

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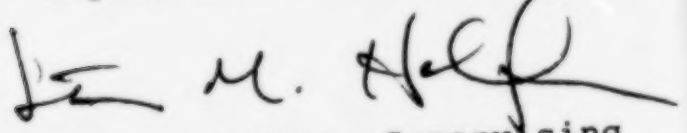

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CERTIFICATE OF SERVICE BY MAIL

JOSEPH G. GRIFFIN, Petitioner,	)	
vs.	)	No. 86-5324
STATE OF WISCONSIN, Respondent.	)	

STAN M. HELFMAN, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building, in the City and County of San Francisco, State of California; that on March 9, 1987, he served a true copy of the attached Brief of the People of the State of California as Amicus Curiae in the above-entitled matter on counsel for petitioner and counsel for respondent by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

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AMICUS CURIAE

BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 86-5324

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INTEREST OF THE AMICI

This brief *amicus curiae* is submitted pursuant to Supreme Court Rule 36.4 by the States of New York, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Michigan, Minnesota, New Hampshire, New Jersey, North Carolina and South Carolina. These states have a significant interest in permitting probation and parole officers to conduct reasonable warrantless searches of the residences of probationers and parolees. In several states, successful challenges to the legality of such searches have impaired the States' ability to supervise probationers

and parolees,[1] and have increased the danger involved in supervising such individuals. The safety, security and welfare of the community at large, the families living with persons under supervision and those who are themselves under supervision are placed at greater risk when reasonable warrantless searches are not permitted.

The Magnitude of the Parolee and Probationer Populations, and their Characteristics.

A review of the staggering figures regarding this nation's adult population under custody or supervision reveals the acute problem faced by the States in administering their criminal justice systems and demonstrates the states' interest here. About one out of every thirty-five adult males in the United States was on probation, in jail or prison or under parole supervision on December 31, 1984. There were 2,665,386 adults (2,342,650 men and 322,736 women) under the custody or supervision of correctional authorities at the end of 1984, distributed as follows:

In jails or prisons	685,681
On parole.....	268,515
On probation.....	1,711,190[2]

[1] For example, in New York, the Second Circuit has held that in the absence of exigent circumstances, the Fourth Amendment requires a search warrant before a probationer's residence may be searched. *U.S. v. Rea*, 678 F.2d 382 (2d Cir. 1982). Also, in a pending lawsuit, *Diaz v. Ward*, No. 75-1194 (S.D.N.Y. Nov. 7, 1980), *app. dismissed*, 652 F.2d 53 (2d Cir. 1981), the New York State Division of Parole has been enjoined from conducting reasonable searches of the residences of parolees without a search warrant. *See also State v. Fogarty*, 610 P.2d 140 (1980); *cf. United States ex rel. Santos v., New York State Board of Parole*, 441 F.2d 1216 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972) (upholding warrantless search of parolee's residence).

[2] Bureau of Justice Statistics, Department of Justice, Bulletin, *Probation and Parole*, NCJ-100181 (February 1986) at 1, 4 and Table 1.

The nation's probation population increased 8 percent during 1984, and the parole population grew by 9 percent.[3] The resulting populations set new records.[4] According to recent Bureau of Justice statistics:

> Probation populations increased during 1984 in 45 of the 52 jurisdictions (the 50 States, District of Columbia, and the Federal system). Parole populations increased in 32 jurisdictions. More than 1 million adults received a probation sentence during the year and 180,000 entered parole supervision. About four-fifths of those discharged from probation were classified as successful completions, compared to less than two-thirds of those exiting parole. In 12 jurisdictions more than two-fifths of those discharged from parole were classified as unsuccessful terminations, most of these the result of reincarceration for violating parole conditions or for committing new crimes.[5]

In order to rehabilitate persons convicted of crimes, as well as carry out legislative and judicial mandates to relieve overcrowded prison conditions, states place virtually all of those sentenced — either immediately upon sentencing or after a period of incarceration — under some form of community supervision.[6] All of these immediate or early releases involve an

[3] *Id.* at 1.

[4] *Id.*

[5] Bureau of Justice Statistics, Department of Justice, Bulletin, *Probation and Parole 1984*, Bulletin NCJ-100181 (February 1986) at 1.

[6] For Fiscal Year 1984-85, of the 12,215 individuals released from New York's State prisons, New York State Department of Corrections Statistical Table, Fiscal Year 1976-77 to 1985-86, 10,920 were released to a form of early release requiring community supervision by the New York State Division of Parole. New York State Division of Parole, Ann. Rep., Fiscal Year 1984-85 ("Ann. Rep.") at 8.

element of risk. *Morrissey* v. *Brewer*, 408 U.S. 471, 483 (1972). States generally offer those inmates who have shown promise of conforming their behavior to more acceptable societal norms the opportunity to serve the larger portion of their sentences out of prison. In New York, this is the concept underlying discretionary release to parole supervision. *N.Y. Exec. Law* § 259-i(2) (McKinney 1987). In light of their prior conduct, however, it is reasonable to assume that a fair percentage of these individuals will engage in unlawful activity during their parole period. In addition, many states have a mandatory release mechanism based upon a formula which credits the inmate's earned "good time" against the undischarged portion of his sentence. *See e.g.*, N.Y. Penal Law § 70.40 (McKinney 1975). Inmates released under this mechanism represent an even greater risk to the community, inasmuch as their release is simply calculated mathematically and is not based upon an evaluation of the inmate's ability to reintegrate into society.

Amici's interest in being permitted to conduct reasonable warrantless searches of releasees' residences is further illuminated by a profile of the parole population. By way of example, of 31,098 parolees under supervision in New York during fiscal year 1984-85, seventy-five percent had been convicted of the violent crimes of murder or manslaughter (11%), assault (4%), or robbery (36%); or of the serious crimes of burglary (13%) or selling narcotics (11%). More than half (57%) of those under supervision had experienced drug problems; almost half (45%) had abused alcohol. These data present a profile of a parolee population that is potentially violent, and ridden with drug or alcohol problems. As a result, it is not surprising that many parolees are returned to prison each year. During fiscal year 1984-85, a total of 3,797 parole violators were returned to prison in the State of New York. One-third were returned to prison as a result of a new felony conviction; two-thirds had violated other conditions of their release agreement. Ann. Rep. at 20 and Table 6.

The statistical breakdown of the parolee population in the other amici states reveals a similar profile. Given that profile, the need for very close supervision of releasees is manifest.

SUMMARY OF ARGUMENT

As most state and federal courts have held, the Fourth Amendment requires neither probable cause nor a warrant as a condition to a search of a parolee's or probationer's residence. The central command of the Fourth Amendment is reasonableness. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). Applying this standard, this Court has in various contexts authorized warrantless searches on less than probable cause. *New Jersey* v. *T.L.O.*; *Hudson* v. *Palmer*, 468 U.S. 517 (1984); *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *Terry* v. *Ohio*, 392 U.S. 1 (1968).

In recognizing exceptions to the probable cause and warrant requirements, the Court has looked primarily at two factors. First, it has examined whether a search without a warrant, or one based on less than probable cause, would run counter to the legitimate expectations of privacy of the persons searched. *New Jersey* v. *T.L.O.*; *Hudson* v. *Palmer*. Second, it has analyzed whether adherence to the probable cause and warrant requirements would frustrate the governmental purposes behind the search. *New Jersey* v. *T.L.O.*; *Donovan* v. *Dewey*.

Application of these factors demonstrates that parolees and probationers may be searched without a warrant where there is a reasonable basis for believing that they have violated the law or otherwise breached the terms of their release. Parolees and probationers have only a modest expectation of privacy in their homes. They recognize that their liberty is conditioned upon compliance with the terms of their release. They are aware that they will be supervised on an ongoing basis by their parole or probation officer and that their lives, at home and elsewhere, will be extensively regulated. And in many states, they agree, as a condition to their release, that their supervising officer may conduct warrantless searches to ensure that they are complying with the required terms of their release. They thus simply cannot reasonably expect that they will enjoy precisely the same Fourth Amendment safeguards as do ordinary citizens.

Moreover, adherence to either a warrant or probable cause requirement would thwart the purposes of the searches here at issue. Parole and probation officers must be able to monitor closely the lives of their charges in order to attain the twin objectives of release supervision: the rehabilitation of inmates and the protection of the community. Information falling short of probable cause frequently comes to the attention of a supervising officer, giving rise to a reasonable suspicion that the parole or probationer is not living up to the terms of his release. Unless the officer can search in such circumstances, and then take corrective action, many releasees will return to drug or alcohol addiction, or to lives of crime. A "reasonable suspicion" requirement will safeguard the legitimate privacy expectations of parolees and probationers while at the same time enabling the states to advance their interest in rehabilitating inmates and protecting society.

ARGUMENT

REASONABLE WARRANTLESS SEARCHES OF THE RESIDENCES OF PAROLEES AND PROBATIONERS DO NOT VIOLATE THE FOURTH AMENDMENT.

It is a majority view of the courts of this nation that a policy of conducting reasonable warrantless searches of probationers' and parolees' residences does not violate the Fourth Amendment. *United States* v. *Jarrad*, 754 F.2d 1451 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 96 (1985); *United States* v. *Scott*, 678 F.2d 32 (5th Cir. 1982); *Owens* v. *Kelley*, 681 F.2d 1362 (11th Cir. 1982); *United States* v. *Bradley*, 571 F.2d 787 (4th Cir. 1978); *Latta* v. *Fitzharris*, 521 F.2d 246 (9th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 895 (1975); *United States ex rel. Santos* v. *New York State Board of Parole*, 441 F.2d 1216, 1218 (2d Cir. 1971).[1] These cases recognize that a parole cause or warrant requirement

[1] Accord, *State* v. *Fields*, 67 Haw. 268, 686 P.2d 1379 (1984); *State* v. *Perbix*, 331 N.W.2d 14 (N.D. 1983); *State* v. *Velasquez*, 672 P.2d 1254 (Utah 1983); *State* v. *Pinson*, 104 Idaho 227, 657 P.2d 1095 (Ct. App. 1983); *State* v. *Earnest*, 293 N.W. 2d 365 (Minn. 1980); *People* v. *Huntley*, 43 N.Y.2d 175, 401 N.Y.S.2d 31, 371 N.E.2d 794 (1977); *People* v. *Anderson*, 189 Colo. 34, 536 P.2d 302 (1975); *State* v. *Sims*, 10 Wash. App. 75, 516 P.2d 1088 (1974).

(footnote continued)

for searches of parolees' or probationers' residences would unduly interfere with the protective and rehabilitative purposes of such searches. They recognize too that reasonable warrantless searches do not interfere with parolees' or probationers' legitimate expectations of privacy.

The Fourth Amendment has never required that all searches be conducted pursuant to a judicially issued search warrant or be based upon probable cause. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Colonnade Catering Corp.* v. *U.S.*, 397 U.S. 72 (1970); *Terry* v. *Ohio*, 392 U.S. 1 (1968). Prisoners do not enjoy the right to be free from warrantless searches, or indeed from any searches. *Hudson* v. *Palmer*, 468 U.S. 517 (1984). Warrantless searches of certain businesses are constitutionally permissible, at least where those businesses are extensively regulated by the state and specific standards have been established to ensure against arbitrary searches. *E.g.*, *Donovan* v. *Dewey*, 452 U.S. 594 (1981). Searches of ordinary citizens in the absence of a warrant are lawful if they are on consent, *Schneckloth* v. *Bustemonte*, 412 U.S. 218 (1973); incident to a lawful arrest, *Chimel* v. *California*, 395 U.S. 752 (1969); where the object seized is in plain view, *Coolidge* v. *New Hampshire*, *supra*; where there are exigent circumstances, *Payton* v. *New York*, 445 U.S. 573 (1980); or, more generally, as this Court very recently stated, in certain circumstances where the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *New Jersey* v. *T.L.O.*, 469 U.S. at 340.

(footnote continued)

It is well established that parolees and probationers* are entitled to some constitutional protection, but because of the conditional nature of their freedom, their right to remain free is protected by fewer safeguards than other citizens. *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parolees not entitled to receive the same degree of due process afforded to persons not convicted of a crime); *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1985) (probationer threatened with revocation of probation may not invoke Fifth Amendment privilege against self-incrimination). This is because the status of being a probationer or a parolee is not the same as being free. *U.S. v. Polito*, 583 F.2d 48, 54 (2d Cir. 1978). "A paroled prisoner can hardly be regarded as a 'free' man; he had already lost his freedom by due process of law and, while paroled, he is still a convicted prisoner whose tentatively assumed progress towards rehabilitation is in a sense being 'field tested.'" *Hyser v. Reed*, 318 F.2d 225, 235 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). This Court has held that probation and parole boards have broad discretion to determine what rights an inmate will regain upon release. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Thus, parolees and probationers do not have the absolute liberty to which ordinary citizens are entitled, but only a conditional liberty properly dependent on observance of special restrictions. *See Morrissey v. Brewer*, 408 U.S. at 480.

Amici recognize that the Fourth Amendment is applicable to searches of parolees and probationers even though parole and

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* The case at bar involves the search of a probationer's residence as opposed to that of a parolee. Amici submit that there is no distinction for this Fourth Amendment issue. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 782 and 782 n.3 (1973) (distinction between parolee and probationer is insignificant for due process purposes). However, to the extent that the status of a probationer differs at all from that of a parolee, the parolee presents a stronger argument in support of the reasonable warrantless search. Parolees have been sentenced, incarcerated and until the day of their release, have had no liberty interest and were not free from warrantless searches in their cells. *Hudson v. Palmer*, 468 U.S. 517 (1984). Moreover, while they regain some liberty interest upon their release, this Court has held that their liberty is not restored

(footnote continued)

probation officers are not considered police officers in most states. This is because the basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *New Jersey v. T.L.O.*, 469 U.S. at 335 (1981), *quoting Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

But, as this Court counseled in *T.L.O.*, a determination that the Fourth Amendment is applicable to a certain class of searches is only the beginning of an inquiry into the standard governing such searches. The central command of the Fourth Amendment is that searches be reasonable. *T.L.O.*, 469 U.S. at 337. The ultimate issue requiring resolution thus is whether a warrantless search based upon a reasonable belief of wrongdoing meets the test of reasonableness. *Id.* The balancing process utilized in this analysis pits the parolee's and probationer's legitimate expectations of privacy and personal security against the government's need for effective methods of protecting the public. Because parolees and probationers can reasonably have only modest expectations of privacy, and because the states have a compelling need to police potential breaches of public order by persons serving sentences for serious crimes, amici submit that warrantless searches, based upon reasonable suspicion, comply with the Fourth Amendment.

Determining whether a parolee's or probationer's expectation of privacy is legitimate itself requires a balancing of society's

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(footnote continued)

to the same degree as that of an ordinary citizen. *Morrissey v. Brewer*, 408 U.S. 471 (1972). They are persons who have been found guilty of serious and violent crimes; who are serving prison terms in the community; and who pose a degree of danger to other members of the community. *Id.* at 483. If this Court holds that reasonable warrantless searches of probationers are appropriate under the Fourth Amendment, such a standard would certainly apply to individuals under parole supervision. If, however, this Court finds such searches impermissible for probationers, amici submit that the risk involved with parolees is such that reasonable warrantless searches are constitutional for this group.

interest in security and the individual's reasonable interest in his privacy. *Hudson v. Palmer*, 468 U.S. 517, 527-528 (1984). Although a parolee's interest in the privacy of his home is clearly greater than was his interest in the privacy of his prison cell, *cf. id.* at 530, the parolee is still well aware that he has been released on condition that he survive "the close and continual surveillance", *id.*, necessary to a determination that he is capable of complying with society's norms. He knows that he will be permitted to serve the balance of his sentence outside the prison's walls only if he survives such scrutiny. A probationer is equally aware that he will be sent to prison unless he can demonstrate to those who are closely scrutinizing him that he is complying with the terms of his probation. Given the extensive regulation of the parolee's and probationer's entire living situation, see n. 9, *supra*, neither the parolee nor the probationer can legitimately expect to have the same privacy rights as ordinary citizens. *Cf. Donovan v. Dewey*, 452 U.S. at 600, *citing United States v. Biswell*, 406 U.S. 311, 316 (1972).

Furthermore, in analyzing the legitimacy of a releasee's expectation of privacy, great weight should be given to longstanding state judicial authority upholding warrantless searches of parolees and probationers. In New York, for example, such authority is overwhelming. *See People v. Huntley*, 43 N.Y.2d 175, 401 N.Y.S.2d 31, 371 N.E.2d 794 (1977) (upholding a search of a parolee's residence, provided it is reasonably related to the performance of the job and duties of the parole officer); *People v. Jackson*, 39 N.Y.2d 64, 382 N.Y.S.2d 736, 346 N.E.2d 537 (1976) (upholding warrantless search of probationer in office of probation officer). *See also People v. Hunt*, 38 A.D. 2d 756 (2d Dept. 1972); *People v. Randazzo*, 15 N.Y.2d 526 (1964), *cert. denied*, 381 U.S. 953 (1965); cases cited *supra* at 6-7 n. 7.

Finally, parolees and probationers cannot legitimately expect to be immune from warrantless searches based on reasonable suspicion inasmuch as states generally expressly condition parole or probation upon the releasee's consent to warrantless searches.[9]

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[9] In New York, every parolee, pursuant to 9 NYCRR 8003.1(c) (1986), must expressly agree to the following conditions of release:

(footnote continued)

Further, the governmental interest in effectuating the parole or probation system outweighs parolees' and probationers'

(footnote continued)

(a) A releasee will proceed directly to the area to which he has been released and, within 24 hours of his release, make his arrival report to that office of the Division of Parole unless other instructions are designated on his release agreement.

(b) A releasee will make office and/or written reports as directed.

(c) A releasee will not leave the State of New York or any other state to which he is released or transferred, or any area defined in writing by his parole officer without permission.

(d) *A releasee will permit his parole officer to visit him at his residence and/or place of employment and will permit the search and inspection of his person, residence and property.* A releasee will discuss any proposed changes in his residence, employment or program status with his parole officer. A releasee has an immediate and continuing duty to notify his parole officer of any changes in his residence, employment or program status when circumstances beyond his control make prior discussion impossible.

(e) A releasee will reply promptly, fully and truthfully to any inquiry of or communication by his parole officer or other representative of the Division of Parole.

(f) A releasee will notify his parole officer immediately any time he is in contact with or arrested by any law enforcement agency. A releasee shall have a continuing duty to notify his parole officer of such contact or arrest.

(g) A releasee will not be in the company of or fraternize with any person he knows to have a criminal record or whom he knows to have been adjudicated a youthful offender except for accidental encounters in public places, work, school or in any other instance with the permission of his parole officer.

(h) A releasee will not behave in such manner as to violate the provisions of any law to which he is subject which provides for penalty of imprisonment, nor will his behavior threaten the safety or well-being of himself or others.

(i) A releasee will not own, possess or purchase any shotgun, rifle or firearm of any type without the written permission of his parole officer. A releasee will not own, possess or purchase any deadly weapon as defined in the Penal Law or any dangerous knife, dirk, razor, stiletto, or imitation pistol. In addition, a

(footnote continued)

diminished privacy interests. See *Morrissey* at 480. The dual purposes of parole are: (1) to assist persons under supervision to adjust to and reintegrate into the community, and (2) to provide protection to the community by ensuring that persons under supervision abide by the conditions of release and if they do not, are returned to prison. *See Morrissey* at 477-479. In order to be effective and to achieve these goals, the supervision process must be flexible and must include a variety of mechanisms to monitor the adjustment of the parolee. Although parolees are regarded as less of a risk than persons still incarcerated for serious or violent crimes, the element of risk is far from nonexistent. *See Morrissey v. Brewer*, 408 U.S. at 483. To manage the risk inherent in every release decision, New York like the other amici states, requires significant and varied contacts between parole officers and parolees. These contacts include interviews in the parole officer's office, as well as visits to the parolee's home and place of employment. During the course of contacts in the home, the officer may be given reason to believe that the parolee or probationer has violated a term of his release. This may necessitate an examination of the releasee's closets, drawers, medicine chests or other belongings. A search

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(footnote continued)

releasee will not own, possess or purchase any instrument readily capable of causing physical injury without a satisfactory explanation for ownership, possession or purchase.

(j) In the event that a releasee leaves the jurisdiction of the State of New York, the releasee waives his right to resist extradition to the State of New York from any state in the Union and from any territory or country outside the United States. This waiver shall be in full force and effect until the releasee is discharged from parole or conditional release. While a releasee has the right under the Constitution of the United States and under law to contest an effort to extradite him from another state and return him to New York, a releasee freely and knowingly waives this right as a condition of his parole or conditional release.

(k) A releasee will not use or possess any drug paraphernalia or use or possess any controlled substance without proper medical authorization.

9 N.Y.C.R.R. §8003.2 (emphasis added). This consent is typical of those required by many other states.

warrant or a probable cause requirement would inordinately delay and limit an officer's ability to monitor compliance and protect the community.

Parole supervision must also include a mechanism to protect individuals who have agreed to live and work with a parolee, as well as society at large. They all have a right to expect that the parole officers will be able to respond rapidly to information concerning violations of the conditions of release, or of criminal activity.

Often, interested family members, neighbors or employers detect inappropriate parolee conduct, such as weapon possession or drug usage, and share the information with the parole officer. Such family-related "tips" are most frequently provided with a request for anonimity, and thus would generally not meet the standard of probable cause required for a search warrant. Similarly, a parole officer may have reason to believe, based upon information that the parolee has been absent repeatedly from work or has otherwise been acting erratically, that he is using alcohol or narcotics, or is using his home as a base for unlawful activities. See *Latta v. Fitzharris*, 521 F.2d at 250. This information would generally not rise to the level of probable cause. Unless the parole officer is able to search in such circumstances, however, he will be unable to ensure that the parolee is complying with the terms of his parole, or to take appropriate steps if the parolee is not in compliance.[10]

The supervisory process is an ongoing one not easily compartmentalized into small, individual tasks as suggested by petitioner. Petitioner concedes that a warrant would not be necessary for a home visit or other "routine" tasks but contends that one should be required prior to an investigation of a "tip" of criminal wrongdoing. The drawing of such a line would undermine the ability of parole and probation officers to insure that the public and persons living and working with parolees and probationers are protected at all times and not just during routine visits.

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[10] Virtually the same analysis applies to searches of a probationer's residence.

A requirement that a search be based upon a reasonable suspicion that the parolee or probationer is violating the conditions of his release, see *Terry v. Ohio*, *supra* and *New Jersey v. T.L.O.*, *supra*, would properly safeguard the releasee's modest interest in privacy. Under this standard, a supervising officer would not be able to search a residence in the absence of "specific, articulable facts" which would form the basis of a rational inference that a condition of parole has been violated. *United States v. Scott*, 678 F.2d at 35. Parolees and probationers could thus not be subjected to an arbitrary search based solely upon whim or an intent to harrass.

In *New Jersey v. T.L.O.*, 469 U.S. 325, this Court, in upholding a warrantless search by school administrators of a student's purse, recognized the need to "strike a balance between some legitimate expectation of privacy by students and the state's equally legitimate right to maintain an environment where learning can take place." It was evident to this Court that some easing of the restrictions to which searches by public authorities are ordinarily subject was appropriate in schools and that a warrant requirement was unsuited to the school environment. Here, too, it is evident that such restrictions should be eased. A search of the home of a parolee or probationer based upon reasonable cause to believe a condition of release has been violated is a reasonable accomodation of the rights of society and of persons who have been convicted of crimes but who are permitted to serve all or a portion of their sentence outside of prison.

CONCLUSION

This Court should hold that the Fourth Amendment permits warrantless searches, upon reasonable suspicion, of the residences of probationers.

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